THE ORIGINAL FTC

Eli Nachmany

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In 1914, Congress established the Federal Trade Commission. At the outset, the agency had a limited set of powers that it exercised in aid of Congress and the courts. Congress provided that the commissioners of the FTC were generally to be free from presidential removal. And in Humphrey's Executor v. United States*, decided in 1935, the Supreme Court upheld these protections as constitutional. The Court in that case rested its holding on the quasi-judicial and quasi-legislative nature of the FTC's functions. Today,* Humphrey's Executor *looms large—its holding suggests that the President cannot remove FTC commissioners at will, even 90 years after the Court decided the case.*

That is incorrect. In the years since Humphrey's Executor*, Congress has expanded the FTC's powers dramatically. It is no longer the quasi-judicial and quasi-legislative agency that the Court in* Humphrey's Executor *evaluated. Thus, because the statutory scheme evaluated in* Humphrey's Executor *no longer exists as it was when the Court decided the case, the Court's holding no longer applies to the modern FTC. The difference between the original FTC and the modern FTC compels the following conclusion: The President can remove FTC commissioners at will without contravening* Humphrey's Executor *or any other precedent of the Supreme Court.*

INTRODUCTION

In 1913, Democrats took control of the White House, the Senate, and the House of Representatives for the first time since the 1890s.[1] During the ensuing legislative session, Congress established an agency that has developed into one of the most consequential in our modern government. That agency is the Federal Trade Commission.[2] The Commission bears an unusual statutory structure that has survived to the present day: a multihead, bipartisan commission whose members the President can remove only for good cause.[3] Its initial iteration also enjoyed a flexible statutory mandate, similar to that of the modern FTC. Nevertheless, the exact powers of the FTC of 1914 were quite different than those of the agency today.[4]

Two decades after the FTC's creation, but before Congress began to expand the agency's powers, the Supreme Court considered the constitutionality of the agency's structure—in particular, the tenure protections for the agency's commissioners. Perhaps seeking to frustrate President Franklin Delano Roosevelt's domestic economic agenda, the Court upheld the constitutionality of the removal protections and ruled that President Roosevelt

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1. *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 48 & n.277 (2003).

2. *See generally id.* (describing the agency).

3. *See* 15 U.S.C. § 41.

4. *See* Mistretta v. United States, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting) (describing the FTC evaluated in *Humphrey's Executor* as "the old Federal Trade Commission, before it acquired many of its current functions").

had acted unlawfully when he fired a commissioner who did not agree with the President's policies.[5] The case—*Humphrey's Executor v. United States*—has blossomed into a core tenet of separation-of-powers law and "a bedrock precedent for the administrative state."[6] It stands as a counterweight to more recent Supreme Court opinions—like *Seila Law LLC v. Consumer Financial Protection Bureau*—that seem to take a more robust view of the President's constitutional power to remove executive officials at will.[7]

In *Seila Law*, the Court declared that tenure protections for the Director of the Consumer Financial Protection Bureau were unconstitutional.[8] Although much of the Court's reasoning in *Seila Law* seemed to suggest that the tenure protections for FTC commissioners were also unconstitutional, the Court expressly declined to overrule *Humphrey's Executor*.[9] Indeed, some defenders of *Humphrey's Executor* hang their hat on an important factual distinction between that case and *Seila Law*: In *Seila Law*, the agency was headed by a single director, whereas in *Humphrey's Executor*, the FTC was—and is—a multimember, bipartisan body.[10]

Still, the Court made an eye-opening observation in *Seila Law*. It suggested "that the 1935 FTC may have had lesser responsibilities than the present FTC"—in a way that could have practical implications for the continued applicability of *Humphrey's Executor*.[11] In dissent, Justice Kagan quibbled with this characterization of the FTC in 1935. She asserted that "the present-day FTC . . . remains independent even if it now has some expanded powers."[12] Of course, the FTC was not before the Court in *Seila Law*, so the Court did not need to reach a definitive answer about the ongoing constitutionality of the agency's tenure protections. But if the majority is correct about the difference between the FTC of 1935 and the FTC of today, and if that difference is legally significant, then the FTC's tenure protections may be unconstitutional notwithstanding *Humphrey's Executor*.[13]

That conclusion would have significant implications for presidential control of one of the most consequential agencies in the government today. Cabining *Humphrey's Executor* by distinguishing the New Deal-era FTC from the modern FTC would allow the President to remove commissioners who do not

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5. Humphrey's Ex'r v. United States, 295 U.S. 602, 624, 632 (1935).

6. Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1838 (2015).

7. *See* Daniel A. Crane, *FTC Independence After* Seila Law 12–13 (CSAS Working Paper, Paper No. 22-02, 2022), https://administrativestate.gmu.edu/wp-content/uploads/2022/08/Crane-FINAL.pdf [https://perma.cc/9H9Y-5VTE].

8. Seila L. LLC v. CFPB, 591 U.S. 197, 238 (2020).

9. *Id.* at 238 (Thomas, J., concurring in part and dissenting in part).

10. *Id.* at 209 (majority opinion).

11. *Id.* at 219 n.4.

12. *Id.* at 286 n.10 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

13. Crane, *FTC Independence After* Seila Law, *supra* note 7, at 19.

share the President's policy views. And if a fired commissioner challenged this understanding of *Humphrey's Executor*, a court could uphold the removal without getting crosswise with prior Supreme Court precedent. That is because the removal protections for FTC commissioners now apply to commissioners who exercise quintessentially executive powers at the core of the President's Article II authority.[14]

This Article mines the history of the FTC and demonstrates why the modern agency is—for the purposes of *Humphrey's Executor*'s holding—different in a legally significant way from what it was in 1935. That difference is meaningful for the purposes of present-day presidential control of the agency. The Article proceeds in three parts. Part I studies the FTC's beginnings as a successor to two agencies: the Interstate Commerce Commission and the Bureau of Corporations. Part II then draws a line from the FTC's creation to the modern day. This Part reviews the FTC's development since *Humphrey's Executor*, including Congress's conferral of an independent litigation power on the agency and other statutory changes. Part III explains why *Humphrey's Executor* does not apply to today's FTC because of legislative changes to the FTC Act since 1935. Further, this Part illuminates why Article II now supersedes the removal protections, thereby allowing the President to remove FTC commissioners without contravening any Supreme Court precedent.

I. THE PRECURSOR AGENCIES: THE INTERSTATE COMMERCE COMMISSION AND THE BUREAU OF CORPORATIONS

The story of the Federal Trade Commission begins well before Congress established the agency in the 1910s. Indeed, the FTC's immediate precursor—the Bureau of Corporations—was itself the outgrowth of a Progressive Era movement that was skeptical of monopolies.[15] In the wake of perceived consolidation in various industries (and fundamental shifts in the American economy after the Civil War), the government undertook efforts against a particular kind of business arrangement: the trust. "Antitrust" policy consisted of both substantive legislation and investigatory endeavors.[16] And when President Theodore Roosevelt took office, investigating—and publicizing—monopolistic behavior was a key element of his antimonopoly agenda.[17]

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14. *See* discussion *infra* Part II.D.

15. *See* Camden Hutchison, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, 2017 COLUM. BUS. L. REV. 1017, 1058–59.

16. *See* discussion *infra* Part I.B.

17. *See id.; cf.* Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025, 2029 (2015) [hereinafter Crane, *All I Really Need to Know*] ("Increasingly over the first decade of the 20th century, Roosevelt came to the conclusion that industrial organization in large corporations was inevitable and permanent. Efforts to restore markets to classical conceptions of atomistic competition would be futile or destructive of society.").

Under President Roosevelt, *investigation* of monopolistic behavior and *enforcement* of antitrust laws were distinct. The Bureau of Corporations, established during the Roosevelt Administration in 1903, was strictly an investigatory agency—even if its findings did form the basis for enforcement proceedings by a separate government entity.[18] After about a decade, the FTC succeeded the Bureau of Corporations.[19] Styling the FTC as an independent regulatory commission, Congress set up the agency with a structure similar to that of another such commission that had existed since the 1880s: the Interstate Commerce Commission (ICC).[20] The history of the Bureau of Corporations and the ICC sheds light on the nature of the original FTC.

One cannot fully understand and appreciate the FTC's origins without understanding the makeup of the two agencies that were key to the FTC's design. This Part tells that story. First, this Part discusses the ICC, whose independent regulatory commission model formed the basis of the FTC's ultimate structure. Second, this Part explores the history of the Bureau of Corporations—the FTC's predecessor.

A. The Interstate Commerce Commission: America's First Independent Regulatory Commission

Post-Civil War America was a country in transition. Nearing its first century as an independent nation, America began to evolve from a localized, agrarian economy to an industrial, interconnected one.[21] The shift created new economic problems for business, including "excessive competition" that drove prices "below remunerative levels" for businesses.[22] By 1879, several businesses had experimented with coordinating their operations through such arrangements as "simple combinations, pools, and corporations."[23] That year, however, Standard Oil created a new kind of arrangement: "the trust proper, which enabled the combination to exercise command and control over its operations much like a corporate holding company but without being hindered by the constraints imposed on corporations by state corporation laws."[24] As businesses consolidated power, their dominance grew.

Around this time, the railroads were also consolidating economic power.[25] Amid this consolidation, farmers were growing weary of railroads'

18. *See* Hutchison, *supra* note 15, at 1058.

19. *See* Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 3, 38 Stat. 717, 717–24.

20. *See* James C. Lang, *The Legislative History of the Federal Trade Commission Act*, 13 WASHBURN L.J. 6, 6 (1974).

21. Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2281–82 (2013).

22. *Id.* at 2291.

23. *Id.* at 2292.

24. *Id.*

25. Lang, *supra* note 20, at 10.

"discriminatory rail practices and high rail freight rates."[26] The railroads employed three kinds of rate discrimination: preferred customers, preferred products, and preferred distance (short-haul/long-haul discrimination).[27] The lattermost kind of discrimination—which "occurred when a railroad charged a higher price per mile for a short haul than it did for a long one"—raised federalism concerns, because although "a state could regulate shipments that commenced and terminated within the state, . . . it had no power to regulate interstate shipments."[28] Accordingly, following a U.S. Senate investigation into rail rates, Congress passed the Interstate Commerce Act in 1887 and declared rail rate discrimination unlawful.[29]

As part of the Interstate Commerce Act, Congress established the federal government's "first regulatory body": the Interstate Commerce Commission.[30] Many have described the ICC as "independent,"[31] but Congress did not clearly set up an entirely independent commission initially. Rather, Congress housed the ICC within the Department of the Interior.[32] The Act provided that the ICC could employ extra staffers "as it may find necessary to the proper performance of its duties, subject to the approval of the Secretary of the Interior."[33] The Act also required that the Secretary furnish the ICC with offices and supplies, subjected the ICC's expenses to the Secretary's approval, and demanded that the ICC submit a yearly report to the Secretary that was to include "such information and data collected by the Commission as may be

26. Janice M. Rosenak, *The ICC and the Railroad Reform Acts*, 16 TRANSP. L.J. 118, 118 (1987); *see also* Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139, 165 (2015) (discussing farmers', merchants', and other shippers' opposition to railroads' predatory pricing).

27. *See* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1046–49 (1988). Hovenkamp explains that "the most notorious" form of customer discrimination came in the form of lower rates for the Standard Oil Company. *Id.* at 1046–47. "[L]ess widely criticized" was rate discrimination on the basis of preferred products, in part because economic modeling demonstrated that such rate discrimination could benefit all. *Id.* at 1048.

28. *Id.* at 1057; *see also* Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557, 573 (1886) (holding that the Federal Constitution's Commerce Clause prohibited states from legislative regulation of rates for interstate shipments, even when those regulations targeted only the intrastate portion of the travel).

29. Interstate Commerce Act of 1887, Pub. L. No. 49-41, §§ 2–3, 24 Stat. 379, 379–80; *see also* S. REP. NO. 49-46, pt. 1 (1886) (describing the work of the Senate select committee that investigated the regulation of interstate rail transportation); Rosenak, *supra* note 26, at 119 ("In brief, the legislation as passed required that all rates be 'just and reasonable.' Discrimination and undue preference and prejudice were prohibited, and the publication of rates and fares was required, with strict adherence to published charges. Under the long-and-short haul clause, no common carrier could receive greater compensation for a shorter than longer distance over the same line 'under similar circumstances and conditions.'").

30. Sofie E. Miller & Susan E. Dudley, *Regulatory Accretion: Causes and Possible Remedies*, 67 ADMIN. L. REV. ACCORD 98, 100 & n.11 (2016).

31. *See, e.g.*, Rosenak, *supra* note 26, at 119.

32. *See* HENRY B. HOGUE, CONG. RSCH. SERV. R47897, ABOLISHING A FEDERAL AGENCY: THE INTERSTATE COMMERCE COMMISSION 4 (2024); *see also* Robert E. Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 13, 44 (1938) (explaining that Congress "attempted in a half-hearted way to put [the ICC] 'in' one of the executive departments").

33. Interstate Commerce Act § 18.

considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary."[34] It was not until a couple of years later—after the election of Benjamin Harrison as President—that Congress stripped the Secretary of these powers of administrative oversight.[35]

Still, to be sure, the ICC's members enjoyed an important degree of independence from the beginning: tenure protections. In the bill setting up the agency, Congress provided that the ICC would "be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate."[36] Congress created a fixed term of years for each commissioner's job, and it staggered these terms so that only one commissioner's term would expire each year.[37] Congress mandated that "[n]ot more than three of the Commissioners shall be appointed from the same political party."[38] And in that section of the statute—perhaps most relevant to this Article—Congress spoke to the President's power of removal with respect to ICC commissioners: The law stated that "[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[39]

Did this mean—pursuant to the *expressio unius* principle of statutory interpretation[40]—that the statute only allowed the President to remove commissioners for one of these three reasons? Congress appears to have believed as much at the time.[41] To be sure: interpreting somewhat similar language in the Customs Administrative Act (which established offices for nine

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34. *Id.* §§ 18, 21.

35. *See* Pub. L. No. 50-382, sec. 8, § 21, 25 Stat. 855, 862 (1889). One commentator reported that the author of the Interstate Commerce Act—Texas Senator John Reagan—moved the Commission outside of the Interior Department because President Harrison had been a "railroad lawyer"; Senator Reagan apparently "did not trust the President any more with [overseeing railroad regulation], so he invented the idea of an independent commission." HOGUE, *supra* note 32, at 4–5 (citing S. COMM. ON LAB. & PUB. WELFARE, SUBCOMM. TO STUDY S. CON. RES. 21, 82D CONG., ESTABLISHMENT OF A COMMISSION ON ETHICS IN GOVERNMENT 213 (Comm. Print 1951)). Indeed, Harrison had represented railroad clients in private practice. Harrison had argued before the Supreme Court on behalf of an Indiana railroad corporation in a case about the obligations of stock subscribers to the company. *See* Allen Sharp, *Presidents as Supreme Court Advocates: Before and After the White House*, 28 J. SUP. CT. HIST. 116, 131 (2003). Other accounts suggest that the Interior Secretary requested that Congress remove the Commission from the Department's purview. *See* HOGUE, *supra* note 32, at 4 (citing ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 67 (1941)).

36. Interstate Commerce Act § 11.

37. *See id.*

38. *Id.*

39. *Id.*

40. Also known as the negative-implication canon, this rule of interpretation counsels that "[t]he expression of one thing implies the exclusion of others." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012).

41. *See* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 27 (2021).

general appraisers of merchandise), the Supreme Court opined in 1903 that "inefficiency, neglect of duty, or malfeasance in office" merely constituted reasons for removal that would have required the provision of notice and an opportunity to be heard.[42] If a President removed an officer without providing notice and a hearing, that action merely would mean that "there is a conclusive presumption that the officer was not removed for any of those causes, and his removal cannot be regarded as the least imputation on his character for integrity or capacity."[43] But unlike the Interstate Commerce Act, the Customs Administrative Act did not provide that the appraisers would each serve for a fixed term of years; that difference may have been dispositive in the 1903 case, given the apparently prevailing legal conception of terms of years.[44]

The reason for the tenure protections appears to have come from the ICC's function. Congress had wanted "to secure a *tribunal* 'informed by experience' and capable of passing impartially upon issues arising out of the act to regulate commerce between the railroads and the public on the one hand, and the railroads and shippers on the other hand."[45] With protections from presidential removal, the ICC's members could implement "the impartial outlook [and] the breadth of knowledge demanded of such a tribunal."[46] Congress seems not to have conceived of the ICC as an executive agency at all.[47] Rather, the key hearing before the Senate Select Committee on Interstate Commerce reveals that Congress was interested in creating something like a court.[48] One of the main problems, however, was that vesting the ICC with judicial power would have required the extension of life tenure to the commissioners.[49]

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42. *See* Shurtleff v. United States, 189 U.S. 311, 317–18 (1903).

43. *Id.* at 317; *cf.* Alonzo H. Tuttle, *Removal of Public Officers from Office for Cause*, 3 MICH. L. REV. 290, 292–93 (1905) (discussing officeholders' reputational interest).

44. *See* Manners & Menand, *supra* note 41, at 24 n.137 ("What the Court in fact held was that the President might replace Shurtleff without cause at pleasure, notwithstanding a provision permitting him to remove Shurtleff for INM, because the statute did not otherwise specify that Shurtleff should continue in office for a term of years. According to the Court, in the absence of explicit tenure-granting language, the Court would not read in tenure for life. The Court thus interpreted the position as an at-pleasure office, rendering the removal permissions irrelevant."); *cf.* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691, 724–25 (2018) (discussing members of Congress comparing the term of general appraisers, who serve "during good behavior," to that of Article III federal judges).

45. Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 356 (1927) (emphasis added).

46. *Id.* In fact, the bipartisan nature of the Commission may have been more important to Congress than the commissioners' insulation from removal. *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1127 & n.77 (2000).

47. *See* Manners & Menand, *supra* note 41, at 7.

48. *See, e.g.*, S. REP. 49-46, pt. 2, at 61 (1886) (statement of Senator Platt); *see also id.* at 87 (statement of Senator Miller) ("I have no doubt at all it is in the power of Congress to create a railroad commission and make it a court for railroad matters."); *id.* at 124 (statement of Senator Collum) ("It has been alleged that whatever commission is created ought to be clothed with judicial power to try cases and decide them."); *id.* at 716–17 (statement of Senator Collum) ("Some persons have urged that that special tribunal, or commission, should be clothed with judicial power, and should be made a court, and the members appointed for life.").

49. *Id.* at 61 (statement of Senator Platt).

The question of judicial power and life tenure featured prominently in the Senate debate about the creation of the ICC. Indeed, Senator Thomas Platt claimed that "[i]f the United States gives the commission judicial powers, of course it must conform to the Constitution, and give the judges a life tenure."[50] Senator Shelby Collum agreed—in his view, "[u]nder our Constitution, if we give the commission judicial powers, we must make it a court, and give a life tenure."[51] So did Senator Isham Harris, who opined in relation to the prospective commissioners that "[i]f they had judicial power they would be appointed for life."[52]

The idea of clothing the ICC with judicial power was a controversial one—at least if it meant life tenure. Witness after witness expressed skepticism about life-tenured commissioners. One issue concerned the separation of powers. Railroad businessman Albert Fink, who gave testimony to the Senate, opined that "in the absence of a well-defined law, and the commissioners making their own laws, no judicial power should be given to them"; he reasoned that "[c]ommissions, or courts, or any body of men, who are at the same time law-makers, judges, and sheriffs, are not to be tolerated in a free country."[53] Another witness opined that life tenure was undesirable because "there ought to be a change, a little fresh blood, every two years or so."[54] Still others expressed concern about marginalizing the proper role of the jury and the existing federal judiciary.[55] Along with all of these potential problems, a fear that "unworthy judges" would come to serve on the ICC motivated Congress to provide the limited "escape hatch" of targeted reasons for removal.[56]

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50. *Id.* at 286 (statement of Senator Platt); *see also id.* at 61 (statement of Senator Platt) ("[I]f we clothe the commission with judicial power here, we must make them judges and give them a life tenure."); *id.* at 624 (statement of Senator Platt) ("Under our Constitution we cannot create such a commission with judicial powers without making the commissioners judges with life tenure."); *id.* at 1014 (statement of Senator Platt) ("We encounter this difficulty: If such a commission is to have judicial power, and power absolutely to enforce its decrees as a court, then it is a court. If we have a United States court of any kind we must have judges with a life tenure.").

51. *Id.* at 699 (statement of Senator Collum); *see also id.* at 904 ("Under our Constitution, . . . if it has judicial powers, or powers of absolutely determining questions without appeal, it would have to be made a court, the members of which, under the Constitution of the United States, would have a life tenure.").

52. *Id.* at 167 (statement of Senator Harris); *see also id.* at 1450 ("[I]f you gave them power to enforce their decrees, no matter by what name you call them, they are in constitutional contemplation a court, and if so the members of the commission would have a life tenure.").

53. *Id.* at 124 (statement of Mr. Fink).

54. *Id.* at 699 (statement of Mr. Elliott).

55. *See, e.g.*, *id.* at 625 (statement of Mr. Cook) ("When you come to say that a man is damaged so much, it is not a question for an expert at all. That would be within the province of an ordinary juror to determine."); *id.* at 949 (statement of Mr. McDill) ("I mean to say this: that I suppose there would be a right to be heard in court in almost all these cases.").

56. Manners & Menand, *supra* note 41, at 57–58.

In the end, the ICC looked like a court with investigatory powers. Critically, however, Congress did *not* create a federal court.[57] Based on the hearing before the Senate Select Committee, Congress would have given life tenure to the commissioners if it understood itself to be endowing the ICC with judicial power.[58] Instead, consider the testimony of one witness, who had suggested that Congress could create a commission and specify that its "decrees . . . could be enforced *through* the courts, without its having any judicial powers."[59] Senator Collum likewise contemplated giving the ICC "authority to investigate the facts and announce its determination, and then turn the matter over to the district attorney, in case the railroad company did not comply with the decision of the commission."[60]

Ultimately, Congress did not give independent power to the ICC to bring such prosecutions on its own. Instead, its main sources of authority came from its ability to subpoena common carriers in connection with Commission investigations and its power to issue orders pursuant to petitions filed by third parties.[61] The law provided "[t]hat any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization" could file a petition with the Commission to complain that a common carrier had violated a substantive provision of the Interstate Commerce Act.[62] Only upon the filing of such a petition by the third party—and the common carrier's refusal to "make reparation for the injury alleged to have been done" after the Commission forwarded the complaint—did the law require "the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."[63] After such an investigation, the Commission would issue its report, noting "the findings of fact upon which the conclusions of the Commission [were] based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured."[64] Along with its report, the Commission would transmit "a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both."[65]

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57. *Cf.* Crawford Hening, *The Interstate Commerce Commission Before the Federal Courts*, 40 U. PA. L. REV. 156, 159 (1892) ("The argument that the Commission is a court, and that, therefore, its decisions are conclusive like the judgments of a sister State, has been regarded with little favor by the Federal judges.").

58. *See* S. REP. 49-46, pt. 2, at 904 (1886) (statement of Senator Collum).

59. *Id.* at 381 (statement of Mr. Kemble) (emphasis added).

60. *Id.* at 1269 (statement of Senator Collum).

61. *See* Interstate Commerce Act of 1887, Pub. L. No. 49-41, §§ 12–13, 24 Stat. 379, 383–84.

62. *Id.* § 13.

63. *Id.*; *see also id.* ("Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.").

64. *Id.* § 14.

65. *Id.* § 15.

Any "prosecutorial" powers of the agency flowed from common-carrier refusal to obey these ICC orders—the powers were thus ancillary to the agency's adjudicatory functions. Whenever a common carrier failed to obey one of these orders, the ICC would bring its own petition in an Article III federal court to enforce compliance.[66] Congress specified that the ICC's findings of fact would be "prima facie evidence" in any "judicial proceedings" to follow the order's issuance.[67] Interpreting the Interstate Commerce Act nearly contemporaneously in 1889, Judge Jackson opined that "[n]o valid constitutional objection can be urged against making the findings of the commission prima facie evidence in subsequent judicial proceedings," because "[s]uch a provision merely prescribes a rule of evidence clearly within well-recognized powers of the legislature, and in no way encroaches upon the court's proper functions."[68] These proceedings resembled those established for contempt of court.[69] In judicial proceedings, the effect of the ICC's findings "merely . . . transfer[red] the burden of proof from the plaintiff to the defendant."[70]

Still, Judge Jackson took a circumscribed view of the agency's authority. He opined that "the commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term."[71] Judge Jackson noted that although "[t]he commission hears, investigates, and reports upon complaints made before it, . . . subsequent judicial proceedings are contemplated and provided for."[72] That was because the Commission's orders did not, of their own force, "yield volu[n]tary obedience thereto."[73] As Judge Jackson saw it, "the commission may be regarded as the general referee of each and every circuit court of the United States," and the federal courts retained the responsibility to consider suits by the Commission "*de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."[74] One commentator even remarked that the ICC "was practically impotent" when created.[75]

When the ICC attempted to venture beyond the statutorily prescribed case-by-case model and fix particular rates as reasonable in a prospective manner,

66. *Id.* § 16.
67. *Id.* § 14.
68. Ky. & Ind. Bridge Co. v. Louisville & N.R. Co., 37 F. 567, 614 (C.C.D. Ky. 1889).
69. *See* Interstate Commerce Act § 16.
70. Hening, *supra* note 57, at 159.
71. *Ky. & Ind. Bridge Co.*, 37 F. at 613.
72. *Id.*
73. *Id.*
74. *Id.* at 613–14.
75. B. B. Kendrick, Jr., *Peace-Time Regulation as a Precedent for National Planning*, 11 SOC. FORCES 574, 574 (1933).

the Supreme Court put a stop to it. As Justice Brewer explained, "[i]t is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thin[g] to prescribe rates which shall be charged in the future—that is a legislative act."[76] And even in the rate-setting case that made its way to the Supreme Court, the ICC had issued its controversial order "upon complaints."[77] Furthermore, in 1899, one commentator lamented a proposed amendment to the Interstate Commerce Act that would have permitted "the Commission to originate . . . proceedings without any complaint whatever."[78] In the 1906 Hepburn Act, Congress would later grant a prospective ratemaking power to the ICC—but only to be exercised upon receipt of a complaint.[79] And even that move raised constitutional concerns about "commingl[ing] legislative, judicial and executive powers in one body" and Congress's power "to delegate . . . a purely legislative function."[80]

Given the agency's powers, commentators and jurists saw the ICC as "quasi-judicial."[81] Congress established a rule (rate discrimination is illegal), and when someone complained that a railroad was breaking that rule, the ICC would hear the dispute in the first instance, find facts, and reach a tentative conclusion—one whose factual findings would be prima facie evidence in a subsequent judicial proceeding.[82] Of course, the Commission could *investigate* railroads on its own volition toward the end of generating reports, but even this investigatory power was distinct from the Commission's power to adjudicate

76. Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 499 (1897). As Louis Capozzi has observed, the Court justified its decision to disallow the ICC from fixing rates in terms similar to the modern "major questions doctrine" in statutory interpretation, "repeatedly emphasiz[ing] the importance of the ICC's claimed power to set railroad freight rates." Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 203 (2023).

77. *Interstate Com. Comm'n*, 167 U.S. at 481; *see also* Charles A. Prouty, *The Powers of the Interstate Commerce Commission*, 167 N. AM. REV. 543, 545–46 (1898) (describing how adverse ratemaking proceedings conducted before the Commission are similar to judicial proceedings).

78. Milton H. Smith, *The Powers of the Interstate Commerce Commission*, 168 N. AM. REV. 62, 62–63 (1899); *see also id.* at 63 ("If the Interstate Commerce Act is amended, as desired by the Commission, . . . [the Commission's] orders can go into effect without any resort to any judicial tribunal for their enforcement . . . .").

79. *See* Hepburn Act of 1906, Pub. L. No. 59-337, sec. 4, § 15, 34 Stat. 584, 589.

80. James Wallace Bryan, *The Constitutional Aspects of the Senatorial Debate upon the Rate Bill*, 41 AM. L. REV. 801, 813–14 (1907) (describing the views of Senator Joseph Foraker during consideration of the Hepburn Act); *see also* John H. Frye, *The Fixing of Rates by the Interstate Commerce Commission Is Unconstitutional*, U. DET. L. REV., May-June 1917, at 1–11 (arguing that Congress cannot delegate ratemaking power to the ICC).

81. *See, e.g.*, HOGUE, *supra* note 32, at 4; Charles A. Prouty, *Court Review of the Orders of the Interstate Commerce Commission*, 18 YALE L.J. 297, 300 (1909); Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 64 F. 981, 982 (C.C.S.D. Ohio 1894); *Notes*, 21 AM. L. REV. 593, 600 (1887) (suggesting that Thomas Cooley should be transferred from the ICC to the Supreme Court because "Cooley [wa]s a great lawyer, and ought to be on [the Supreme Court], and not on a *quasi*-judicial board").

82. *See* HOGUE, *supra* note 32, at 3–4.

disputes involving railroad rates.[83] Moreover, the orders arising out of those adjudications were subject to judicial review.[84] As one ICC commissioner put it: in such disputes, "the Commission was in essence a master in chancery to the Court, and while the Court would give to its findings and conclusions the respect due to those of an expert body, they were still always subject to review by the Court itself."[85]

B. A Distinct Antitrust Strategy: The Bureau of Corporations

The Interstate Commerce Act was merely one front of a broader policy movement. The late 1880s also saw the enactment of substantive legislation at the state and federal level aimed at proscribing the consolidation of corporate power. Responding to the Standard Oil Company's creation of the "trust proper," these statutes came to be known as "antitrust" laws.[86] But the passage of these laws was not the end of the story. In the early 1900s, Congress established another agency: the Bureau of Corporations.[87] The Bureau relied on a particular method of effectuating the government's antitrust agenda: publicity. In preparing reports for public distribution, the Bureau aimed to arouse public concern about certain corporations and cajole companies into abandoning consolidation.[88] As the direct precursor to the FTC, the Bureau offers insight into the legal community's original conception of a subset of the FTC's powers.

Several states, including Kansas, enacted antitrust laws in the late 1880s.[89] Judge Easterbrook has expressed skepticism "that the aggregation of economic power . . . led to the statutes."[90] Indeed, Judge Easterbrook suggests a more parochial origin: "farmers' belief that by 1889 they could gain from curtailing railroads' cartels and price discrimination."[91] But whatever the impetus for state antitrust laws, Congress stepped decisively into the fray at the federal level in 1890 with the Sherman Act.[92] Named for its leading sponsor in the Senate—Ohio Senator John Sherman—the law declared that "[e]very contract,

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83. *See* Albert Langeluttig, *Constitutional Limitations on Administrative Power of Investigation*, 28 ILL. L. REV. 508, 509–11 (1933).

84. This review was meaningful. As Judge Jackson wrote, a federal court in a case involving an ICC order "is not made by the act the mere executioner of the commissioner's order or recommendation, so as to impose upon the court a non-judicial power." Ky. & Ind. Bridge Co. v. Louisville & N.R. Co., 37 F. 567, 613–14 (C.C.D. Ky. 1889). Instead, as Judge Jackson explained, "[t]he suit in [federal] court is, under the provisions of the act, an original and independent proceeding." *Id.* at 614.

85. Prouty, *supra* note 81, at 300.

86. *See* David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 142 (1990).

87. *See* Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 74 (1990).

88. *Id.* at 75.

89. *See* Millon, *supra* note 86, at 141.

90. Frank H. Easterbrook, *Commentary: Antitrust 1889*, 29 WASHBURN L.J. 150, 152 (1990).

91. *Id.* at 154.

92. Sherman Act of 1890, Pub. L. No. 51-647, § 1, 26 Stat. 209, 209.

combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," was "illegal."[93] The Sherman Act did not create a new federal bureaucracy; rather, it provided that federal prosecutors, "under the direction of the Attorney-General," had a "duty . . . to institute proceedings in equity to prevent and restrain . . . violations" of the Act.[94] The Act also established a private right of action for "[a]ny person . . . injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by th[e] act."[95]

Because Congress did not "set up [a special agency] to administer and enforce the Sherman act, . . . the act was at first not enforced with as much vigor as had been hoped for."[96] As consolidation continued apace, Congress proposed the creation of an inquiring commission to study the issue and recommend legislation (essentially in aid of Congress's legislative power).[97] After President Grover Cleveland vetoed the establishment of such a commission, President William McKinley approved the idea in 1898.[98] Nineteen members comprised the Commission, "nine of whom were appointed by the President from civil life, the other ten being members of Congress,—five Senators appointed by the Vice-President, and five Representatives appointed by the Speaker."[99] As one Commission member observed at the time, the Commission's structure had "no precedent in the United States," but its "mixed organization" was "precedent[ed] in several of the English Royal Commissions"—most notably the English Royal Commissions on labor, including one appointed in 1891 whose report he "described as the most important publication on the labor question that ha[d] yet been written."[100]

As to the problem of trusts, the Commission recommended a remedy calculated to sway public opinion: "publicity."[101] But the trusts issue was merely

93. *Id.* § 1.

94. *Id.* § 4.

95. *Id.* § 7.

96. A. M. Tollefson, *Judicial Review of the Decisions of the Federal Trade Commission*, 4 WIS. L. REV. 257, 258 (1927); *see also id.* ("[T]his duty and responsibility was vested in the courts and in the office of the attorney-general, which agencies were already burdened with the enforcement of numerous national laws . . . .").

97. *See* S. N. D. North, *The Industrial Commission*, 168 N. AM. REV. 708, 708–09 (1899); *see also* E. Dana Durand, *The United States Industrial Commission; Methods of Government Investigation*, 16 Q.J. ECON. 564, 564–65 (1902) ("The rise of the trusts was probably the chief ground which led to the establishment of the Industrial Commission by act of Congress of 1898.").

98. North, *supra* note 97, at 708.

99. *Id.*

100. *Id.* at 708–09. For a history of the English Royal Commissions, see generally Thomas J. Lockwood, *A History of Royal Commissions*, 5 OSGOODE HALL L.J. 172 (1967) (providing a history of the English Royal Commissions).

101. Durand, *supra* note 97, at 576–77 (describing the Commission's recommendations); *see also* Tollefson, *supra* note 96, at 258 ("As to methods of reform, the commission recommended extensive publicity regarding the operation of corporations . . . ."). Durand had been "successively editor and secretary to the Commission from October, 1899, until its dissolution." Durand, *supra* note 97, at 564 n.*.

a component part of the Commission's vast jurisdiction of inquiry. Congress had endowed the Commission with the power to investigate a variety of issues: immigration, labor, agriculture, manufacturing, and the like.[102] Although the Commission's work began under President McKinley, President Theodore Roosevelt had assumed the presidency by the time that the Commission issued its final report in 1902—a consequence of President McKinley's assassination in 1901.[103] And as the Commission came around to suggesting reforms across industries, President Roosevelt, in his first State of the Union message in 1901, lauded a proposal from the prior Congress when he opined that "[t]here should be created a Cabinet officer, to be known as Secretary of Commerce and Industries . . . ."[104] President Roosevelt recommended that "[i]t should be his province to deal with commerce in its broadest sense; including among many other things whatever concerns labor and all matters affecting the great business corporations and our merchant marine."[105]

Spurred by President Roosevelt's call for a new federal bureaucracy, as well as the Industrial Commission's recommendations, Congress got to work. During the debates on the issue, "the advocates of a Department of Commerce agreed to a compromise with those seeking a Cabinet voice for labor" and passed a bill to create "a new executive department with a dual title, the Department of Commerce and Labor."[106] President Roosevelt signed the bill that day.[107]

Alongside an array of other new bureaus that Congress established within the Commerce Department was the Bureau of Corporations.[108] Section 6 of the Act enumerated the powers of the new Bureau, which was to be headed by a single commissioner.[109] "[U]nder the direction and control of the Secretary of Commerce and Labor," the Commissioner of Corporations had a defined task:

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102. *See* North, *supra* note 97, at 709; *see also id.* ("This reads like a wholesale commission to reform the industrial world, to invent the missing panacea for the ills that afflict mankind, to point out the royal road to universal contentment and prosperity which the world has sought in vain since the days when 'Adam dolve and Eve span.'"); Durand, *supra* note 97, at 565 ("[I]n order that every class of the discontented might feel that their case was receiving due consideration, the Commission was empowered 'to investigate . . . ' . . . practically the entire field of industry.").

103. President Theodore Roosevelt, First Annual Message (Dec. 3, 1901), https://www.presidency.ucsb.edu/documents/first-annual-message-16 [https://perma.cc/ME5L-Y7T6].

104. *Id.*

105. *Id.*

106. *Origins: 1776–1913*, U.S. DEP'T OF COM., https://www.commerce.gov/about/history/origins [hereinafter *Origins*] [https://perma.cc/8BLQ-VUFF] (last visited Sep. 15, 2025); *see also* Commerce Department Organic Statute, Pub L. No. 57-87, § 1, 32 Stat. 825, 825 (1903) (creating the Department of Commerce and Labor).

107. *See Origins*, *supra* note 106.

108. *See id.* ("The new Department of Commerce and Labor was one of the largest and most complicated in Government. It included a Bureau of Corporations, Bureau of Immigration, Bureau of Navigation, Light House Board, Steamboat Inspection Service, Bureau of Statistics, Coast and Geodetic Survey, Bureau of Standards, Bureau of Census, Bureau of Fisheries, and the still to be organized Bureau of Manufactures.").

109. *See* Commerce Department Organic Statute § 6.

"diligent investigation into the organization, conduct, and management of the business of" corporations engaged in interstate commerce—with the exception of common carriers, which were already within the ICC's investigative (and adjudicatory, to be sure) jurisdiction.[110] The purpose of this investigative authority was "to gather such information and data as [would] enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require."[111] One might understand this statutory directive as empowering the Commissioner of Corporations—an executive official—to assist the President in exercising his power under the Recommendations Clause.[112] Pursuant to the law, the President could make this information public.[113] Moreover, the bill provided that the Bureau had a duty "to gather, compile, publish, and supply useful information concerning [certain] corporations."[114] To enable the Bureau to gather this information and write its reports, Congress clothed the Bureau with the ICC's power "to subpœna and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths."[115]

The Bureau was meant to complement the ICC—Congress envisioned an agency that would "investigat[e] the interstate activities of large corporations which were *outside* the [ICC's] jurisdiction."[116] Still, the Commissioner of Corporations' "only power was to investigate."[117] This was deliberate: "While the Bureau . . . would not have the power to mandate certain behavior,

110. *Id.*

111. *Id.*

112. *See* U.S. CONST. art. II, § 3 ("[The President] shall from time to time give to the Congress Information of the state of the Union, and *recommend to their Consideration such Measures as he shall judge necessary and expedient* . . . ." (emphasis added)). For a robust discussion of this power, see Chad Squitieri, *"Recommend . . . Measures": A Textualist Reformation of the Major Questions Doctrine*, 75 BAYLOR L. REV. 706, 750–58 (2023).

113. *See* Commerce Department Organic Statute § 6; *see also* Kornhauser, *supra* note 87, at 74 ("[T]he 1903 law establishing the Bureau of Corporations, gave the President discretionary power to publicize information gathered by the Commissioner of Corporations."). The bill originally required the Bureau to publish its findings, but "[w]hen the legislation reached the conference committee, . . . Senator Knute Nelson (R-MN), acting at Roosevelt's behest, introduced an amendment requiring the Bureau to report its findings directly to the President. The President would then, using his executive discretion, determine whether to make such information available to the public." Hutchison, *supra* note 15, at 1059.

114. Commerce Department Organic Statute § 6.

115. *Id.*

116. Tollefson, *supra* note 96, at 258 (emphasis added); *see also* H. T. Newcomb, *The Bureau of Corporations*, BULL. COM. L. LEAGUE AM., Mar. 1904, at 7 ("The Bureau of Corporations is endowed with authority in regard to the investigation of corporations engaged in interstate commerce, other than those subject to the jurisdiction of the Interstate Commerce Commission . . . .").

117. Alexander G. Barret, *The Federal Trade Commission—Part I—Administrative Powers*, 81 CENT. L.J. 166, 168 (1915) [hereinafter Barret I]; *see also* FED. TRADE COMM'N, FTC HISTORY: BUREAU OF ECONOMICS CONTRIBUTIONS TO LAW ENFORCEMENT, RESEARCH, AND ECONOMIC KNOWLEDGE AND POLICY 9 (2003), https://www.ftc.gov/sites/default/files/documents/public_events/roundtable-former-directors-bureau-economics/directorstablegood.pdf [https://perma.cc/7SBQ-MR2F] ("[T]he Bureau of Corporations was created as an investigatory, not a law enforcement group.").

proponents of federal incorporation believed that by requiring corporations to publicize their finances and activities, the Bureau could ensure that 'corporations represented themselves honestly and . . . [abided] by federal rules.'"[118] As one commentator noted, the idea of the Bureau marshaling public opinion against corporations through investigations and publicity "was a departure from the Sherman act" and its substantive regulation of industry.[119] But as the Commissioner of Corporations indicated a few years later, some saw "public opinion [as] the most effective reforming force against industrial evils."[120]

The Bureau did not exactly flex its muscles—and the public noticed. A decade after the Bureau's creation, one writer noted that "the Bureau ha[d] never so pressed its compulsory powers to provoke a test of their validity."[121] To be sure, the Bureau did robust work behind the scenes, entering into agreements with several major corporations to defer government enforcement of antitrust law in exchange for access to internal business documents.[122] Nevertheless, some believed that its record "proved the ineffectivenes[s] of the Anti-Trust laws," sparking calls for Congress to do more.[123] The Supreme Court did not help matters; it issued two decisions—*Northern Securities Co. v. United States* in 1904[124] and *Standard Oil Co. v. United States* in 1911[125]—that took a more circumscribed view of the Sherman Act's prohibitions.[126] After the Court's decisions, public concern arose about the prospect that the laws on the books were not enough to deal with corporate consolidation, and the 1912 presidential election saw "two of the three major parties declare[] in their platforms for the creation of an independent commission to deal with at least some phases of the trust problem."[127] Progressive Democrat Woodrow Wilson

118. Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1517 (2006) (alteration in original) (quoting Melvin L. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160, 177 (1982)).

119. *See* Tollefson, *supra* note 96, at 259.

120. Lang, *supra* note 20, at 16; *see also* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1219 (1986) ("[T]he Bureau of Corporations was an expression of the 'sunshine' approach to regulation. The regulator, as a collector and disseminator of information, would cleanse corporate practice through the medium of public scrutiny, while simultaneously educating the business community about efficient methods of competition.").

121. Carman F. Randolph, *The Inquisitorial Power Conferred by the Trade Commission Bill*, 23 YALE L.J. 672, 680 (1914).

122. *See* Hutchison, *supra* note 15, at 1064.

123. Warren F. Drescher, Jr., Note, *Unfair Competition Under Federal Law*, 9 ST. LOUIS L. REV. 294, 302 (1924); *see also* Michael F. Gallagher, *The Federal Trade Commission*, 10 ILL. L. REV. 31, 31–32 (1915) ("Th[e] Bureau could do little because it had no corrective or regulative functions, and its powers of inquiry and investigation were very limited.").

124. 193 U.S. 197 (1904).

125. 221 U.S. 1 (1911).

126. *See* Tollefson, *supra* note 96, at 259–60.

127. *Id.* at 260. The 1912 election featured incumbent Republican William Howard Taft, Democrat challenger Woodrow Wilson, and third-party candidate Theodore Roosevelt (representing the "Bull Moose" Party). Daniel A. Crane, *All I Really Need to Know*, *supra* note 17, at 2027. Wilson and Roosevelt both called

would go on to win that election, and he immediately set out to deal with the problem of trusts.[128] The result was a new federal agency: the Federal Trade Commission.[129]

II. THE BIRTH AND THE DEVELOPMENT OF THE FTC

One of the most consequential outcomes of the 1912 presidential election was the establishment of the independent Federal Trade Commission in 1914.[130] Just over twenty years later, the Supreme Court in *Humphrey's Executor v. United States* would declare that the FTC's independence did not violate the Constitution.[131] In so doing, the Court focused on the powers that Congress had conferred on the agency.[132] Understanding the exact contours of those powers—and their origins—will allow one to ascertain the ongoing applicability of *Humphrey's Executor* to the modern FTC in light of changes to the FTC's authorities that have occurred since the Court decided *Humphrey's Executor*.[133]

This Part proceeds as follows: First, this Part describes the establishment of the FTC in 1914—noting in particular the importance of the ICC and the Bureau of Corporations to Congress's understanding of what it was doing when creating the agency. Second, this Part surveys the Court's decision in an important case that was decided after the establishment of the FTC but before the issuance of *Humphrey's Executor*: *Myers v. United States*, in which the Court recognized a strong presidential removal power as a default rule. Third, this Part considers the Court's 1935 decision in *Humphrey's Executor* and attempts to make sense of the rule to be derived from the case in light of later precedents. Fourth, this Part highlights key legislative changes after 1935 that altered the character of the FTC in a manner that made *Humphrey's Executor* no longer applicable to the agency.

A. Congress and President Wilson Establish a New Federal Commission

By 1911, Attorney General George Wickersham conceded that the Department of Justice was "not organized or equipped to maintain constant supervision and control over business organizations"—taking a position on a

for an independent commission. Meanwhile, Eugene Debs—a fourth candidate who was running under the banner of the Socialist Party—"argued for complete nationalization of trusts." *Id.*

128. *See* Tollefson, *supra* note 96, at 260.

129. *Id.* at 261.

130. *See id.* at 260–61 (discussing consequences of the 1912 presidential election).

131. Humphrey's Ex'r v. United States, 295 U.S. 602, 628–29 (1935).

132. *See* discussion *infra* Part II.C.

133. *See* discussion *infra* Part II.D.

question that Wickersham described as "a matter of current comment."[134] Wickersham observed that because the Justice Department "deals only with cases of violation of the law," Congress would need to set up "an administrative board or commission" if it wanted an entity that was "directed to preventing [Sherman Act] violations, and [to] aiding business men to maintain a continued status of harmony with the requirements of law."[135] The establishment of such a commission would, perhaps, incorporate the work of the Bureau of Corporations. But, as Wickersham saw it, the real question was: "Should the analogy of the Interstate Commerce law and Commission be followed?"[136]

President Wilson explicitly requested that Congress establish a commission. In a January 1914 address to a joint session of Congress on the subject of trusts and monopolies, Wilson declared that "[t]he antagonism between business and government is over."[137] He opined that "the business men of the country . . . desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission."[138] Wilson saw three main roles for the commission: (1) "information and publicity," in the tradition of the Bureau of Corporations; (2) "a clearing house for the facts" about monopoly, ostensibly to assist Congress in considering legislation; and (3) "an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case."[139]

1. The House Bill and the Stevens Amendment

Congress went to work on President Wilson's proposal of an interstate trade commission, alongside other antitrust legislation for which he advocated

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134. George W. Wickersham, U.S. Att'y Gen., What Further Regulation of Interstate Commerce Is Necessary or Desirable, Address Before the Minnesota State Bar Association 13 (July 19, 1911), https://www.loc.gov/resource/gdcmassbookdig.whatfurtherregul00wick/?st=slideshow#slide-9 [https://perma.cc/J6FC-GJ9L].

135. *Id.*

136. *Id.* at 10.

137. President Woodrow Wilson, Address to a Joint Session of Congress on Trusts and Monopolies (Jan. 20, 1914), https://www.presidency.ucsb.edu/documents/address-joint-session-congress-trusts-and-monopolies [https://perma.cc/FUC7-PPCJ].

138. *Id.*

139. *Id.* As an example of the third function that Wilson envisioned, he suggested that some "[p]roducing industries . . . cannot always be dissected into their component units as readily as railroad companies or similar organizations can be," given that "[t]heir dissolution by ordinary legal process may oftentimes involve financial consequences likely to overwhelm the security market and bring upon it breakdown and confusion." *Id.* For that reason, Wilson recommended that "[t]here ought to be an administrative commission capable of directing and shaping such corrective processes, not only in aid of the courts but also by independent suggestion, if necessary." *Id.*

After the enactment of the FTC Act, one commentator noted that the President's speech was "the stimulus to action, the proximate cause of the" FTC Act's passage. John B. Daish, *The Federal Trade Commission*, 24 YALE L.J. 43, 46 (1914).

in the address. Wilson had not specified the exact contours of the commission's powers.[140] Meanwhile, several members of Congress "insisted . . . that a *tribunal* should be created, with power to mold and adapt the law to each new situation."[141] But, when the House of Representatives proposed its first iteration of the commission bill on May 22, 1914, its drafters merely "envisioned a slightly expanded Bureau of Corporations, an investigative and 'advisory' body whose advice would afford only limited protection to its recipient."[142]

In what one commentator has described as "[t]he bill's prime innovation," the bill's drafters purported to remove the commission from the Department of Commerce and establish the body as an independent agency—preventing the President from exercising control over it.[143] This was an explicit paean to the Interstate Commerce Commission's structure; as the House Report on the bill explained, "the great value to the American people of the Interstate Commerce Commission has been largely because of its independent power and authority," remarking that "[t]he dignity of the proposed commission and the respect in which its performance of its duties will be held by the people will also be largely because of its independent power and authority."[144] The bill specified that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office," and provided that the powers of the Bureau of Corporation "shall be exercised by the commission free from the direction or control of the Secretary of Commerce."[145] After some amendments, the House easily passed the bill, approving it by voice vote just a few weeks later on June 5.[146]

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140. *See* George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 PROCS. ACAD. POL. SCI. N.Y.C. 114, 115 ("The President . . . urged the establishment of an interstate trade commission . . . without, however, any definite declaration as to the powers it should have.").

141. Tollefson, *supra* note 96, at 260 (emphasis added). Senator Francis Newlands had remarked in 1913 that if, after passing the Sherman Act, Congress "had organized an interstate trade commission similar to the Interstate Commerce Commission, and with somewhat similar powers of investigation and correction, [Congress] would have prevented or remedied many of the abuses which have since grown up." S. REP. NO. 62-1326, at 18 (1913), *reprinted in* 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3740–41 (Earl W. Kintner ed., 1982) [hereinafter 5 LEGISLATIVE HISTORY]. In Senator Newlands's view, the commission would have "gradually evolved a system of commercial law, through administrative process, as complete as that which has been built up regarding our system of transportation." *Id.*, *reprinted in* 5 LEGISLATIVE HISTORY, *supra*, at 3741.

142. Winerman, *supra* note 1, at 59; *see also* Rublee, *supra* note 140, at 115 ("The bill to create a Trade Commission gave no regulatory power to the Commission. It was to be an investigating and advisory body, hardly more than an amplification of the existing Bureau of Corporations.").

143. Winerman, *supra* note 1, at 59.

144. H. REP. NO. 63-533, at 3 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3757–58. Echoing the lead-up to the Interstate Commerce Commission bill, the leading advocates of the House FTC bill were especially concerned with attracting "[t]he highly efficient services of men of large capacity," and the prestige associated with independence came along with a $10,000 salary—which the House Report adjudged would "enable the President to secure that sort of men." *Id.* at 2, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3757.

145. H.R. 15613, 63d Cong. §§ 1, 3 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3769–70.

146. *See* Winerman, *supra* note 1, at 59.

The wide margin of passage in the House masked some significant disagreements among the body's membership. Under the original House bill, the commission would have had "little real power."[147] In connection with its role in publicizing corporate misconduct and assisting Congress in considering remedial legislation, the commission that the original House bill envisioned "could investigate, issue subpoenas, demand annual reports from business, provide information to the Executive, and produce its own reports for the public or Congress."[148] Additionally, the commission "could serve as a master in equity to advise a court about remedies in a government antitrust case, a potentially significant but still advisory role."[149]

One member of the House desired a stronger body, however. First-term Representative Raymond Stevens, a Democrat of New Hampshire, offered an amendment to the commission bill that did not make it through. He attempted to augment the commission's powers by directing it "to prevent corporations engaged in commerce from using unfair or oppressive methods of competition."[150] Stevens proposed that whenever the new commission believed that a corporation was violating this provision, it would make the corporation "appear before the commission and show cause why an order shall not be issued by the commission restraining and prohibiting said corporation from using such method of competition."[151] And should the commission determine that the corporation was indeed in violation of the "unfair or oppressive methods" prohibition, Stevens's amendment instructed that the commission should issue a restraining order.[152] To enforce the restraining order, however, the commission would have to petition a federal court, "praying said court to issue an injunction to enforce such order of the commission."[153]

This proposed amendment sparked vigorous debate. Representative Charles Bartlett, a Democrat of Georgia, spoke immediately in an attempt to scuttle the amendment. Raising a point of order in an effort to get Stevens's amendment thrown out, he criticized the amendment as "not germane . . . to any of the provisions or purposes of the bill."[154] Appearing to relitigate the ICC debates, Bartlett opined that the amendment "propose[d] to confer upon the commission judicial powers, to give it the power to restrain in some way, by order, the doing of certain things, which power can not be conferred upon

147. *Id.*
148. *Id.* at 59–60.
149. *Id.* at 60.
150. 51 CONG. REC. 9059 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3879.
151. *Id.*
152. *See id.*
153. *Id.* at 9060, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3879.
154. *Id.*

anyone except a judicial body."[155] Bartlett expressed concern that the commission would, under the amendment, "have power to do that which Congress has not the power to confer upon it," given that the commission was not an Article III court.[156] Stevens interjected to state that his amendment went no farther than the powers that Congress had already granted to the Interstate Commerce Commission, but Bartlett responded that "[t]he Interstate Commerce Commission goes to the court to secure the enforcement of its orders."[157] Stevens was surprised by this attempt to distinguish the ICC's powers; he accused Bartlett of not listening to the amendment, and he replied that the amendment would "merely give[] the commission power to make an order, just as the Interstate Commerce Commission makes an order, and then the commission must go to the court to get the order enforced."[158] Nevertheless, the Chairman sustained Bartlett's point of order that the amendment—which would embrace "a number of substantive propositions"—was not germane.[159]

Although Stevens's proposed amendment did not make it through the House, President Wilson appeared to be on board with supporting the amendment "when the bill reached the Senate."[160] Representative Victor Murdock, a Progressive of Kansas, had even remarked during the House debate that he had "a lively suspicion that the amendment . . . w[ould] go upon th[e] bill in the Senate."[161] Wilson's support was thanks in large part to a meeting in which Stevens—along with Stevens's advisor George Rublee, Wilson confidante Louis Brandeis, and others—had participated with the President around the time that the House passed the bill in early June 1914.[162]

2. The Senate Debates and the Conference

After passing the House, the trade commission bill went to the Senate. Just over a week after the House referred its bill to the Senate, the Senate Committee

155. *Id.* As a chronological synopsis of the FTC Act's legislative history describes it, Stevens offered an "amendment to give the commission *judicial powers* to issue restraining orders." 5 LEGISLATIVE HISTORY, *supra* note 141, at 3712 (emphasis added).

156. 51 CONG. REC. 9060 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3879; *see also id.* at 3879–80 ("[I]f in calling the attention of the Chair to the provisions of the substitute I point out that it clearly violates the Constitution I think it is a very proper thing to suggest to the Chair that we can not by a bill which proposes merely to create a commission to ascertain certain information and to report it, and whose duties are confined solely to investigation and the making of reports, confer upon that commission judicial powers—not simply ministerial powers, but powers which you would confer upon a court to restrain by an order—that such a proposition is not germane to this section nor germane to this bill.").

157. *Id.*, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3880.

158. *Id.*

159. *Id.* at 9061, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3882.

160. Winerman, *supra* note 1, at 62.

161. 51 CONG. REC. 9062 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3882.

162. Winerman, *supra* note 1, at 62; *see also* Rublee, *supra* note 140, at 116–17 (discussing the meeting).

on Interstate Commerce reported a substitute bill.[163] Murdock was right—in Section 5 of the Senate bill was the following declaration: "[U]nfair competition in commerce is hereby declared unlawful."[164] After that sentence, the Senate bill rounded out Section 5 with a few paragraphs that closely tracked the Stevens amendment—spelling out exactly the sort of powers (to issue restraining orders with the requirement that a court enforce them) to which Bartlett had objected.[165] Rublee attributed Section 5's inclusion in the bill to his and Stevens's meeting with Wilson and Brandeis.[166]

Weeks of debate ensued over the bill; Rublee recounted that "the entire debate centered on Section 5."[167] For the purposes of this Article, three of the leading subjects of the debate are particularly relevant. *First*, the commission's independence was an important topic of discussion. *Second*, senators quarreled over the commission's discretion to define "unfair methods of competition" (as well as the power of the courts to review the commission's determinations). *Third*, the senators failed to reach a consensus about exactly what kind of power the commission exercised.

Beginning with the commission's independence: On June 13, 1914, Senator Newlands submitted a report on behalf of the Senate Interstate Commerce Committee along with the new Senate bill.[168] The report lauded the proposed commission's "greater prestige and independence," when compared to the Bureau of Corporations, as a good way to attract knowledgeable commissioners.[169] The report also claimed that this independence, reinforced by a requirement that no more than three members of the commission could be part of any one political party, would ensure that the commission's decisions would "be more readily accepted as impartial and well considered"—not "open to the suspicion of partisan direction."[170] Moreover, Congress was seeking to create a quasi-judicial commission modeled after the ICC; independence was a natural fit.[171]

Not all senators were enthused about empowering an independent commission with broad powers.[172] Senator William Borah, a Republican of Idaho, objected strenuously. He cautioned that one could only evaluate the wisdom of endowing the ICC with independence "in the sweep of . . . years,"

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163. S. REP. NO. 63-597, at 3 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3902.

164. *Id.*

165. *See id.* at 3–4.

166. *See* Rublee, *supra* note 140, at 116–17.

167. *Id.* at 117.

168. *See* S. REP. NO. 63-597, at 1 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3900.

169. *Id.* at 11, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3908.

170. *Id.* One episode particularly lessened public confidence in partisan enforcement of antitrust law: the Roosevelt Administration had brought a lawsuit under the Sherman Act, the Taft Administration had dismissed it, and the Wilson Administration had renewed it. *See* CUSHMAN, *supra* note 35, at 189–90.

171. *See id.* at 189–90.

172. *See id.* at 192–93.

and he remarked that he was "not willing to take . . . the industrial business of this country . . . and place [it] entirely away from the electorate, entirely away from the recall of the people."[173] Echoing these concerns, Republican Senator Charles Townsend of Michigan commented that the commission would be "responsible to no power outside of its own will."[174] One senator—John Works of California—even speculated that the commission would struggle to "withstand the pressures which would be brought to bear upon it by 'the powerful combinations of wealth.'"[175] Commenting on the worries of some senators about "vesting so much power in the commission," Florida Senator Duncan Fletcher—a Democrat—noted "the fact that each commissioner is appointed only for seven years, and that he is subject to removal for malfeasance in office."[176]

Moving along to the commission's power to define "unfair methods of competition," the issue of judicial review was on the minds of many. For many senators, the most troubling exchange occurred near the opening of the debate on the bill. Asking the question that was apparently on most senators' minds, Senator Charles Thomas—a Democrat of Colorado—inquired "whether, under the first sentence of section 5, everything is unfair competition which a majority of the commission shall determine."[177] After some uncomfortable back and forth, Senator Cummins took the position that the commission, although defining unfairness within its broad discretion, would be "as much bound to obey the law as is any court which is established to administer justice."[178] Various senators feared that a lack of judicial review would give too much power to the commission.[179]

Finally, during the debate, the senators advanced various views of the nature of the FTC's power. They did not come to a consensus. Senator Cummins referred to the bill as establishing "purely an executive or administrative tribunal."[180] Meanwhile, Senator George Sutherland—a Republican of Utah who would become a Supreme Court Justice less than a

173. 51 CONG. REC. 11235 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4014.

174. *Id.* at 11871, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4107.

175. CUSHMAN, *supra* note 35, at 193 (citing 51 CONG. REC. 12276 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4188–89). To be sure, the draft commission bill did not even create a fully independent agency. One provision in the bill allowed for the President to suggest that the commission undertake certain investigations. *See* S. 4160, 63d Cong. § 3(g) (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3927. Iowa Republican Senator William Kenyon wondered whether this provision was consistent with the rest of the bill, and fellow Iowa Republican Senator Albert Cummins replied that although he personally thought that "the whole subsection might well be stricken out," he reported that the Wilson "administration desire[d] that part of the bill." 51 CONG. REC. 11529 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4067.

176. 51 CONG. REC. 11237 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4016–17.

177. *Id.* at 11103, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3947.

178. *Id.* at 11104, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3949.

179. *See* CUSHMAN, *supra* note 35, at 202–03.

180. 51 CONG. REC. 12742 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4257.

decade later and author the Court's opinion in *Humphrey's Executor*—opined that the bill would unconstitutionally confer both legislative and judicial power on the commission.[181] In a line that tracked Representative Bartlett's objection to the Stevens amendment in the House, Senator Sutherland stated that "[t]he fact that the order can not be made finally effective except by the interposition of the court will not prevent the prior proceedings of the commission from being in the nature of an exercise of the judicial power."[182] As to the Section 5 adjudicatory proceedings, Senator Atlee Pomerene—a Democrat of Ohio—commented that such a proceeding was "not, in any ordinary sense of the term, an adversary proceeding; it is one sui generis," yet he ultimately noted that whatever "it may be nominally," the proceeding was "as a matter of fact . . . adversar[ial]."[183]

Notwithstanding some important outstanding disagreements (most notably, the issue of judicial review), the Senate passed its version of the bill 53–16.[184] But because the Senate passed a bill that was different than that of the House, the two bodies needed to convene in a conference so that they could hammer out a final piece of legislation. The debates in the conference centered on the judicial review issue. As the conferees deliberated, two major figures submitted dueling briefs on the question. On one side, Commissioner of Corporations Joseph "Davies filed a brief supporting a narrow standard of review," while Rublee submitted his own brief arguing for "broad review of agency determinations that a practice was unfair."[185] Wilson supported Rublee's approach,[186] and the final bill reflected—if not explicitly—Rublee's view prevailing over that of Davies and Senator Cummins on the judicial review question.[187] Both the House and the Senate passed the final bill, which became law on September 26, 1914.[188]

3. The FTC Act—Enacted

The conferees produced a law that (as Representative Harry Covington, a Democrat of Maryland and the chair of the House subcommittee that drafted

181. *Id.* at 12855–57, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4324–27. Senator Works shared Senator Sutherland's skepticism. *See id.* at 12276, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4189 ("This bill is an attempt to confer on th[e] commission both legislative and judicial power."). Interestingly, when asked about the difference between the investigatory powers conferred upon the Bureau of Corporations and those which the bill purported to confer on the commission, then-Senator Sutherland said that he thought "the powers conferred upon the Bureau of Corporations are entirely beyond the authority of Congress." *Id.* at 12806, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4294.

182. *Id.* at 12856, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4326.

183. *Id.* at 13315, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4670.

184. *See id.* at 13318–19, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4678–79.

185. Winerman, *supra* note 1, at 90–91.

186. *See id.* at 91.

187. *See* discussion *infra* Part II.A.3.

188. *See* Winerman, *supra* note 1, at 91–92.

the original bill, stated) brought the House and Senate bills "into harmony."[189] Entitled the Federal Trade Commission Act, the bill created the Federal Trade Commission (FTC).[190] The biggest change from the House bill to the Senate bill was the addition of Section 5, which proscribed unfair methods of competition.[191] In the end, Congress transferred the work of the Bureau of Corporations to the FTC and endowed the agency with other powers, establishing an independent regulatory commission in the mold of the ICC.[192]

The ICC and the Bureau of Corporations were the canvas upon which Congress drew the FTC. The final bill created a commission of five commissioners—appointed by the President but removable only for cause.[193] Those causes were "inefficiency, neglect of duty, [and] malfeasance in office."[194] The law instructed that "[n]ot more than three of the commissioners shall be members of the same political party," and it provided for staggered seven-year terms for each of the commissioners.[195] As one scholar observed, the FTC "was organized in much the same manner as was the Interstate Commerce Commission."[196] Meanwhile, Section 3 of the new law abolished the Bureau of Corporations and transferred all of its work to the new commission, providing that "all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission."[197]

Before discussing Section 5, this Part reviews some of the other provisions of the final bill. Section 6 listed a grab bag of other powers that grew out of the Bureau of Corporations—including the power to investigate corporations and to make reports to Congress that included recommendations for new legislation.[198] One subsection of Section 6—which would become a flashpoint later on—empowered the agency "to classify corporations and to make rules

189. 51 CONG. REC. 14925 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4716.

190. *See* Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 1, 38 Stat. 717, 717 (codified as amended at 15 U.S.C. § 41).

191. *Compare* 5 LEGISLATIVE HISTORY, *supra* note 141, at 3751 (House bill not proscribing unfair methods of competition), *with id.* at 3902 (Senate bill proscribing unfair methods of competition).

192. *See infra* notes 197–98 and accompanying text.

193. *See* Federal Trade Commission Act § 1.

194. *Id.*

195. *Id.*

196. Lang, *supra* note 20, at 6.

197. Federal Trade Commission Act § 3; *see also* Heinrich Kronstein, *Reporting on Corporate Activities*, 38 U. DET. L.J. 589, 591 (1961) ("The principal purpose of the Federal Trade Commission Act was to strengthen and extend the work of the Bureau of Corporations . . . .").

198. *Compare* Act of Feb. 14, 1903, Pub. L. No. 57-87, § 6, 32 Stat. 825 (1903) (conferring on the Bureau of Corporations the "power and authority to make . . . diligent investigation into the organization, conduct, and management of the business of [certain] corporation[s] . . . and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce"), *with* Federal Trade Commission Act § 6 (conferring similar powers on the FTC). *See also* William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE U. L. REV. 319, 335 n.87 (2007) ("The absorption of the Bureau into the FTC ensured that the Commission would make research and analysis central ingredients of its operations.").

and regulations for the purpose of carrying out the provisions of this Act."[199] Although the FTC would enjoy a far greater degree of independence in carrying out the tasks in Section 6 than did the Bureau of Corporations, the FTC Act still provided for the Commission to undertake certain investigations at the direction of the President and the Attorney General, respectively, as well as each House of Congress.[200] Additionally, Section 7 of the FTC Act allowed courts to refer antitrust suits in equity—when brought by the Attorney General—to the Commission for a formulation of a recommended disposition.[201] In this capacity, the Commission would act "as a master in chancery," reporting to the court in question.[202] The law also gave broad powers to the Commission as it related to the securing of testimony from corporations and the issuing of subpoenas.[203] Congress further bolstered these powers through a criminal contempt mechanism for those who disobeyed the subpoena.[204]

Section 5 was robust. It began with the unqualified statement "[t]hat unfair methods of competition in commerce are hereby declared unlawful."[205] The section "empowered and directed" the FTC "to *prevent*" the use of these unfair methods of competition.[206] To carry out this objective, Congress set up a procedural scheme: the Commission, whenever it had "reason to believe that a[] . . . person, partnership, or corporation" was violating Section 5, would issue a complaint and hold a hearing.[207] The party to the adjudicatory proceeding would have to "show cause" why the Commission should not enter a cease and desist order; if the party failed to do so and the Commission was "of the opinion that the method of competition in question is prohibited by [Section 5]," then the Commission would "make a report in writing in which it . . . state[d] its findings as to the facts, and . . . issue" the cease and desist order.[208] Naturally, this order was equitable in nature—the Commission could only enjoin future conduct.[209]

Consistent with the debates in the House and Senate, Section 5 provided that if a party refused to obey the cease and desist order, then the Commission

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199. Federal Trade Commission Act § 6(g).

200. *Id.* § 6(c)–(e); *see also* Randolph, *supra* note 121, at 676 (quoting Harry Covington as stating that "[t]he independent initiative of the commission is preserved in every part of the bill except the single section in which the commission is made the investigating agent of the President, the Attorney General or either House of Congress to report to them the facts found as to alleged violations of the Anti-Trust laws").

201. Federal Trade Commission Act § 7.

202. *See id.*

203. *See id.* § 9.

204. *See id.* § 10.

205. *Id.* § 5.

206. *Id.* (emphasis added).

207. *Id.*

208. *Id.*

209. *See* 51 CONG. REC. 14932 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4732.

would have to go to a federal court to obtain the order's enforcement.[210] Congress resolved the judicial review question by making the Commission's "findings . . . as to the facts, if supported by testimony, . . . conclusive," while remaining silent on what courts should do with the Commission's legal conclusions.[211] Those legal conclusions included "findings that a given practice was an 'unfair method of competition,'" which Representative Covington urged should be given "the respect due to those of an expert body."[212] Then, just a few years after the passage of the FTC Act, the Supreme Court stepped in and resolved the issue. In an opinion by President Wilson's former Attorney General James McReynolds, whom Wilson had put on the Court in 1914, the Court held that "[i]t is for the courts, not the commission, ultimately to determine as matter of law what ['unfair methods of competition'] include."[213]

Exactly what sort of power would the newly established Commission exercise? Commenting on the final bill, Covington emphasized that the "commission w[ould] have no power to prescribe the methods of competition to be used in future. In issuing its orders it will not be exercising power of a legislative nature."[214] Notwithstanding the similarities between the FTC and the ICC, Covington noted that Congress had deliberately chosen *not* to confer the prospective rulemaking power on the FTC that it had added onto the ICC's powers via the Hepburn Act of 1906 (after the ICC had been around for some time and gained a measure of prestige).[215] Additionally, Covington stated that although the FTC would "exercise power of a judicial *nature*," the Constitution provided that "power to act *finally* in a judicial capacity c[ould] be conferred only upon a court."[216] For that reason, the FTC would have to go to court to enforce its orders.

Covington distinguished between executive findings of fact (referencing determinations in the contexts of immigration and customs) and judicial determinations of law. In Covington's view, "the determination of the question whether a method of competition is unfair is not a determination purely of fact,

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210. *See* Federal Trade Commission Act § 5. The subject of a cease and desist order could also petition for review in federal court. *See id.*

211. *Id.*

212. Winerman, *supra* note 1, at 83 (quoting 51 CONG. REC. 14932 (1914)).

213. FTC v. Gratz, 253 U.S. 421, 427 (1920), *overruled by* FTC v. Brown Shoe Co., 384 U.S. 316, 320–22 (1966); *see also* Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 BYU L. REV. 147, 169–70 (2020) ("The [ICC], the [FTC], and other Progressive Era agencies enjoyed broad adjudicatory powers, including the power to set just and reasonable rates and to find that companies had engaged in unfair trade practices. However, these decisions were ubiquitously reviewable by federal courts and, as one case after another made clear, through de novo review.").

214. 51 CONG. REC. 14932 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4732.

215. *See id.*

216. *Id.* (emphasis added). For this principle, Covington cited the Supreme Court's decision in *Kilbourn v. Thompson*, 103 U.S. 168 (1881), which involved the House of Representatives' attempt to punish a party for refusing to testify or tender requested documents in connection with a subpoena.

but necessarily involves the determination of a question of law."[217] Thus, the FTC's work under Section 5 would be—like that of "the Commissioner of Patents in awarding priority of invention to an applicant and adjudging him to be entitled to a patent"—performed "in a *quasi judicial* capacity."[218]

Representative Frederick Stevens, a Republican of Minnesota, saw the final commission bill in three parts: executive, legislative, and judicial. He described the FTC's publicity power—which it took over from the Bureau of Corporations—as related to the executive function.[219] And he labeled the Commission's work in "investigat[ing] for the benefit of Congress" and providing recommendations to that body, as well as to the President, as a "legislative function."[220] Meanwhile, Stevens stated that the Commission's efforts to enforce Section 5 would constitute judicial work in which the Commission would "perform some functions which [were then] performed by the courts."[221]

Other contemporary commentators pointed out the limited nature of the FTC's powers. W.T. Holliday noted the "semi-judicial duties and functions of the Commission" that Section 5 provided.[222] W.H.S. Stevens similarly mentioned that the FTC Act "conferred upon the commission the quasi-judicial function of passing upon the fair or unfair character of a given method—a determination formerly made judicially by the courts in passing upon questions of restraint of trade and monopoly."[223] John Daish remarked on "[t]he recent tendency to create branches of the government exercising legislative, executive and judicial powers, but independent of each of the three grand divisions," explaining that "[t]he powers of such bodies are frequently termed administrative, yet no one has seen fit to . . . define the term . . . ."[224] Daish pointed out that the ICC—a "tribunal"—was one such body, and the FTC was another.[225]

Former President William Howard Taft stated that the ICC had "a much wider discretion and range of judgment, free from examination and review by the courts, than the [FTC] has in finding the facts and making the restraining order as to 'unfair competition.'"[226] Taft observed that while the ICC "exercis[es] in detail the legislative function of Congress of rate regulation," the FTC "is merely to apply the law to the facts as a Master in Chancery would

217. 51 CONG. REC. 14933 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4735.
218. *Id.*, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4735–36 (emphasis added).
219. *See id.* at 14934, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4737.
220. *Id.* at 14935, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4740.
221. *Id.* at 14934–35, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4737, 4741.
222. W. T. Holliday, *The Federal Trade Commission*, 8 A.B.A. J. 293, 293 (1922).
223. W. H. S. Stevens, *The Trade Commission Act*, 4 AM. ECON. REV. 840, 852 (1914).
224. Daish, *supra* note 139, at 43.
225. *Id.*
226. *Ex-President Taft's Address to the American Bar Association*, L. STUDENT'S HELPER, Jan. 1915, at 5, 6.

do."[227] Thus, as Taft pointed out, "when the court comes to consider the [FTC]'s action on review, it takes its findings and order and treats them as it would the report of a Master in Chancery, with the exception that it cannot re-examine a finding of fact unless there is no legal evidence to support [it]."[228] Although Section 7 explicitly provided for the FTC to act as a master in chancery, Taft appeared to describe the FTC's work in Section 5 adjudication as akin to playing this role as well.[229]

In its early years, the FTC noticed that some "unfair practices charged against individual companies were common throughout an industry."[230] The Commission thus held gatherings of industry—known as Trade Practice Conferences—at which "[r]esolutions condemning such acts, methods and practices as unfair, harmful, bad business practice and unlawful, were adopted by a substantial majority and reported to the [FTC] as the views of the industry."[231] The Commission "would hold a public hearing on the proposed rules" and memorialize them as Trade Practice Conference Rules, but such rules depended "on voluntary compliance by industry members" and "were not regarded as legally binding."[232]

Whether described as "quasi-judicial" or "administrative," the FTC was neither a court nor a legislature. Covington described it best: the FTC would "exercise power of a judicial *nature*"—given that it found facts in the first instance through an adjudicatory process and it issued restraining orders.[233] But that power was not formally judicial, because the FTC needed an actual Article

227. *Id.*

228. *Id.* at 6–7.

229. *Id.* Another commentator described the powers in both Section 5 and Section 7 as involving "judicial powers" because "in the exercise of the powers conferred by those two sections, the Commission is really an adjunct to the judiciary." Barret I, *supra* note 117, at 167; *see also* Alex G. Barret, *The Federal Trade Commission—Part II—Judicial Powers*, 81 CENT. L.J. 183, 183 (1915) ("§ 5 . . . makes the Commission an adjunct to the judiciary, conferring upon it powers judicial in their nature."). In contrast, this commentator described Section 6 as conferring "administrative powers." Barret I, *supra* note 117, at 167.

230. *See* Harry C. McCarty, *Trade Practice Conferences*, CORP. PRAC. REV., June 1930, at 19, 20.

231. *Id.*

232. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 551 (2002); *see also* R. E. Freer, Chairman, Fed. Trade Comm'n, Remarks on the Trade Practice Conference Procedure of the Federal Trade Commission Before the Floor Machinery Manufacturers Association, at 3 (Apr. 22, 1948), https://www.ftc.gov/system/files/documents/public_statements/677871/19480422_freer_remarks_._floor_machinery_manufacturers_association.pdf [https://perma.cc/8KSE-QUAD] ("[I]n such case the Commission does not proceed on the basis of violation of the [trade practice conference] rules, but because the law itself upon which the rules are based has been violated. This calls for issuance of formal complaint and hearings, respondents being accorded the right to cross examine and adduce evidence, to make objections, exceptions, motions, appeals, to submit briefs and oral argument, and finally to review in the courts if [an] order to cease and desist is entered. It is the full dress statutory procedure.").

233. 51 CONG. REC. 14932 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4732 (emphasis added).

III court to enforce its orders after it undertook adjudications.[234] Additionally, the FTC's investigating and reporting to Congress would play a valuable role in helping the legislature formulate new antitrust legislation.[235] But—as demonstrated by the explicit distinction between the FTC's powers and the ICC's post-Hepburn Act ratemaking authority—the FTC was not itself a legislature and it did not exercise legislative power.[236]

B. The Supreme Court Recognizes the Presidential Removal Power

In 1926, the Supreme Court decided one of the most important separation-of-powers cases in American history. In *Myers v. United States*, the Court articulated a robust view of the President's constitutional removal power, determining that it superseded a federal statute that required the advice and consent of the Senate for the removal of a particular executive official.[237] Some posited that the opinion's logic would invalidate the FTC's tenure protections, but the opinion itself appeared to disavow such a conclusion.[238] Nevertheless, *Myers* seemed to tee up the question whether the FTC Act contravened Article II—a question that the Court would soon answer.

Frank Myers had been a postmaster first class in Portland, Oregon.[239] President Wilson had appointed Myers to a four-year term in 1913, and he reappointed Myers for another four-year term in 1917.[240] Myers had been a Wilson loyalist, but he made enemies in Oregon and was reported to have "run the Portland post office in a high-handed, dictatorial, and manipulative fashion that alienated workers, customers, and all but a handful of local Democratic activists."[241] By 1920, Wilson had lost confidence in Myers. Complicating matters, the 1876 statute that established Myers's office provided that the President could only remove postmasters with the advice and consent of the Senate.[242] Undeterred, President Wilson—after unsuccessfully demanding Myers's resignation[243]—fired Myers without the consent of the Senate.[244]

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234. *See* Chamber of Com. of Minneapolis v. FTC, 13 F.2d 673, 683 (8th Cir. 1926) ("The Federal Trade Commission is no part of the judicial system of the United States. It does not exercise judicial powers. It is an administrative body created by statute.").

235. 51 CONG. REC. at 14935 (1914), *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4740.

236. *Id.* at 14932, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 141, at 4732.

237. Myers v. United States, 272 U.S. 52, 176 (1926).

238. Jonathan L. Entin, *The Curious Case of the Pompous Postmaster:* Myers v. United States, 65 CASE W. RSRV. L. REV. 1059, 1075–76 (2015).

239. *See Myers*, 272 U.S. at 106.

240. Entin, *supra* note 238, at 1061–62.

241. *Id.* at 1063.

242. *See* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 971 (1994).

243. *See Presidential Power of Removal from Office*, 11 CONST. REV. 34, 35 (1927).

244. *See* Bruce Y. Curry, Note, *President's Power of Removal—Consent of United States Senate*, 6 OR. L. REV. 165, 165 (1927).

Predictably, Myers sued. He sought "the amount of salary to which he would have been entitled if he had continued to serve as postmaster for the remainder of the term in the office for which he was appointed."[245] Wilson "did not specify that []his defiance of the 1876 Act was based on constitutional grounds," but one scholar asserts that "it is fair to assume that it was."[246] In any event, once the case made it up to the Supreme Court, the question before the Court was "whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."[247] If so, Congress could not trammel upon that power by conditioning a postmaster's removal on the advice and consent of the Senate.

The Court answered the question in the affirmative and ruled in Wilson's favor.[248] In so doing, the Court ruled "that the . . . 1876 [Act], by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid."[249] The Court's reasoning was important. The Court grounded its decision in Article II's grant of "general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed."[250] Thus, for an executive officer like a postmaster, the removal power inherent in Article II precluded congressional efforts to require the advice and consent of the Senate for removal.

But what about the FTC? Justice McReynolds dissented in *Myers*, and he lamented that as a result of the Court's decision, a member of the ICC, FTC, or another independent regulatory commission "holds his place subject to the President's pleasure or caprice."[251] This aggressive reading of the *Myers* opinion appeared to assume bad faith on the part of the majority. True, *Myers* suggested that "strong reasons" existed "why the President should have a . . . power to remove his appointees charged with other duties than" those "of the heads of departments and bureaus in which the discretion of the President is exercised and which [the Court had] described [as] the most important in the whole field of executive action of the Government."[252] Yet, apparently referencing those "appointees charged with other duties," the Court observed that "there may be duties of a *quasi*-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of

245. *Id.*
246. May, *supra* note 242, at 971.
247. Myers v. United States, 272 U.S. 52, 106 (1926).
248. *See id.* at 176.
249. *Id.*
250. *Id.* at 163–64.
251. *Id.* at 182 (McReynolds, J., dissenting).
252. *Id.* at 134–35 (majority opinion).

individuals, the discharge of which the President can not in a particular case properly influence or control."[253] To the extent that the Court saw the FTC as an *executive* tribunal (or its members as *executive* officers merely endowed with *quasi*-judicial powers), the Court explained that "even in such a case[, the President] may consider the [tribunal's] decision *after* its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."[254] That, the Court claimed, was a necessary component of the President's "constitutional duty of seeing that the laws be faithfully executed."[255]

On one reading, the Court accepted implicitly the constitutionality of the restrictions in the FTC Act (given the *quasi*-judicial character of the agency), while specifying that although the President could not control the Commission's decisions, he could use them as post hoc evidence that a commissioner was acting inefficiently, neglectfully, or in a malfeasant manner. The dissents were not impressed, however. Justice McReynolds stated in a footnote that he regarded "as a mere smoke screen" "[t]he suggestion that different considerations may possibly apply to nonconstitutional judicial officers."[256] Meanwhile, Justice Brandeis—whom President Wilson had also put on the Supreme Court at that point—suggested a totally different idea in a separate dissent. Justice Brandeis described the FTC Act as "authorizing removal for . . . [i]nefficiency, neglect of duty, [and] malfeasance . . . , *not restricting,* however, under *Shurtleff v. United States*, the President's power to remove for other than the causes specified."[257] On its face, Justice Brandeis appeared to be suggesting that the FTC Act did not create an independent agency at all; rather, Justice Brandeis's citation of *Shurtleff* indicates that he may have seen the statute as merely requiring notice and an opportunity to be heard for "INM" removals and recognizing an otherwise unrestricted removal power. Yet that reading of *Shurtleff* was inconsistent with *Shurtleff* itself, which did not concern officers who served for a specified term of years (like those leading the ICC and the FTC).[258]

Setting aside Justice Brandeis's apparently idiosyncratic reading of both *Shurtleff* and the FTC Act, contemporary commentators debated Justice McReynolds's assessment of how the *Myers* decision applied to the FTC. Edward Corwin, a political science professor, opined that *Myers* voided the FTC Act.[259] In contrast, an unsigned comment in the Michigan Law Review took the

253. *Id.* at 135 (emphasis added).
254. *Id.* (emphasis added).
255. *Id.*
256. *Id.* at 182 n.* (McReynolds, J., dissenting).
257. *Id.* at 262 n.30 (Brandeis, J., dissenting) (emphasis added) (citation omitted).
258. *See supra* notes 40–44.
259. Corwin, *supra* note 45, at 358.

position that "[i]t may be doubted whether [McReynolds's] construction is warranted" as to the FTC.[260] The board urged that "[t]he court had before it only the case of a first class postmaster and the prevailing opinion was, in terms, confined to executive officers."[261] As the comment stated, "Chief Justice Taft said explicitly that different considerations might control in the case of non-Constitutional judicial officers," and "the court could not be said to have repudiated *Myers v. United States* if, in a future case, it should deny the President unrestricted power to remove . . . members of quasi-judicial tribunals."[262] Agreeing with the comment, another scholar, James Beck, advanced the view that *Myers* "may hereafter be regarded as having left undecided . . . whether quasi-judicial bodies, like the Federal Trade Commission, . . . are within the scope of the decision, and therefore the question in all its possible phases may not be wholly at rest."[263] Beck continued: "But as to all executive officers who are not quasi-judicial, it now seems clear that the power to remove, while not in terms granted by the Constitution, is, nevertheless, vested in the President as a part of his executive prerogative . . . ."[264]

C. The Supreme Court Upholds the FTC's Structure

As Justice McReynolds's dissent indicates, *Myers* teed up the question whether the FTC Act's removal protections were constitutional. The question would reach the Supreme Court within a decade.[265] And the Court would conclude that Congress did not contravene the Constitution when it insulated the FTC's commissioners from at-will presidential removal.[266] To this day, courts cite the 1935 case that decided the issue, *Humphrey's Executor v. United States*, for the proposition that the FTC commissioners' tenure protections are constitutional.[267] But *Humphrey's Executor* concerned the FTC as it was in 1935—the direct descendant of the FTC Act that Congress passed in 1914. As Part II.D will show, the FTC of the present day is quite a different agency with different powers.[268] This Part studies the *Humphrey's Executor* decision.

260. Comment, *Constitutional Law—President's Power of Removal*, 25 MICH. L. REV. 280, 287 (1927).

261. *Id.* (implying apparently that FTC commissioners are not "executive officers").

262. *Id.*

263. James M. Beck, Book Review, 78 U. PA. L. REV. 444, 445 (1930) (reviewing CHARLES E. MORGANSTON, THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT OF THE UNITED STATES (1929)).

264. *Id.*

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

266. *Id.* at 632.

267. *See, e.g.*, FTC v. Syngenta Crop Prot. AG, 711 F. Supp. 3d 545, 588 (M.D.N.C. 2024).

268. *See* discussion *infra* Part II.D.

In 1925, President Calvin Coolidge appointed former Congressman William Humphrey to the FTC.[269] After Humphrey served a six-year term, President Herbert Hoover reappointed him for another six years in 1931.[270] Humphrey was a partisan, probusiness Republican, and he ruffled some feathers on the Commission.[271] A year after Humphrey's reappointment, America elected Franklin Delano Roosevelt as President.[272] A Democrat, President Roosevelt favored more government intervention into the economy—a popular policy view at the time, given the onset of the Great Depression.[273] President Roosevelt and Commissioner Humphrey thus took different approaches to economic policy matters.

A few months after taking office, President Roosevelt asked Humphrey to resign.[274] Roosevelt wrote the following to Humphrey: "[T]he aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection . . . ."[275] After Humphrey responded that he needed some time to speak with his friends, Roosevelt later wrote the following: "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."[276] But Humphrey refused to step down. So, despite the tenure protections in the FTC Act, Roosevelt wrote to Humphrey again and told him: "Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."[277] Humphrey refused to acquiesce in the removal.[278]

Like Frank Myers, Humphrey sued for the remaining salary that he was owed.[279] And, like Myers, Humphrey's case made it up to the Supreme Court. This time, the Court certified two questions:

> 1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office', restrict or limit the

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269. *See The Presidency: Limited Power*, TIME MAG. (June 3, 1935), https://content.time.com/time/subscriber/article/0,33009,883377,00.html [https://perma.cc/E9BC-5HQF].

270. *See id.*

271. *See* Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925 to 1929*, 77 ANTITRUST L.J. 701, 710–11 (2011).

272. *See Franklin D. Roosevelt: The 32nd President of the United States*, WHITE HOUSE, https://bidenwhitehouse.archives.gov/about-the-white-house/presidents/franklin-d-roosevelt/ [https://perma.cc/Y8CG-DVFH] (last visited Sep. 15, 2025).

273. *See id.*

274. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 618 (1935).

275. *Id.* (internal quotations omitted).

276. *Id.* at 619.

277. *Id.* (internal quotations omitted).

278. *See id.*

279. *See id.* at 612.

> power of the President to remove a commissioner except upon one or more of the causes named?
> If the foregoing question is answered in the affirmative, then—
> 2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?[280]

The two questions essentially mirrored the assertions in Justice Brandeis's and Justice McReynolds's *Myers* dissents. First, did *Shurtleff* mean, as the Brandeis dissent suggested, that the FTC Act allowed the President to remove FTC commissioners at will and only required notice and a hearing if the President sought to remove a commissioner for inefficiency, neglect of duty, or malfeasance?[281] Second, was the attempt in *Myers* to distinguish the FTC truly a "smoke screen," as Justice McReynolds believed?[282]

Neither of the Justices' submissions in their dissents would come to pass. Dealing with the first issue, the Court distinguished *Shurtleff* for the reason noted above: the FTC Act "fixes a term of office," whereas the statute at issue in *Shurtleff* did not.[283] As the Court observed: in general, "the fixing of a definite term subject to removal for cause . . . is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause."[284] That was especially true in the case of a "non-partisan" commission that "must, from the very nature of its duties, act with entire impartiality."[285] Describing the FTC, the Court stated that "[i]ts duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative"—observing that the FTC was "[l]ike the Interstate Commerce Commission."[286] Given this construction of the statute (and the Court's refusal to extend *Shurtleff* to the FTC), the Court would need to answer the constitutional question.

In so doing, the Court sustained the constitutionality of the removal protections. *Myers* was front and center. The Court pointed out that although the case constituted "the government's chief reliance," it merely stood for "the narrow point . . . that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress."[287] For that reason, *Myers* did "not come within the rule of *stare*

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280. *Id.* at 619 (quoting 15 U.S.C. § 41).

281. *See* Myers v. United States, 272 U.S. 52, 241, 262 & n.30 (1926) (Brandeis, J., dissenting).

282. *Id.* at 182 n.2 (McReynolds, J., dissenting).

283. *Humphrey's Ex'r*, 295 U.S. at 623.

284. *Id.*

285. *Id.* at 624.

286. *Id.*; *see also id.* at 625 (citing the FTC Act's legislative history for the proposition "that one advantage which the commission possessed over the Bureau of Corporations . . . lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction"); *id.* (describing the commission as a "tribunal").

287. *Id.* at 626.

decisis," and to the extent that *Myers* was "out of harmony" with the Court's ultimate ruling on the FTC Act's constitutionality, the Court declared such "expressions . . . disapproved."[288] Drawing a distinction between *Myers* and the case before it, the Court contrasted the office of postmaster—"an executive officer restricted to the performance of executive functions" who "is charged with no duty at all related to either the legislative or judicial power"—with the FTC: "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid."[289] Unlike the office of postmaster, the Court stated, the FTC "cannot in any proper sense be characterized as an arm or an eye of the executive."[290]

In its affirmative justification of its holding, the Court pointed to the FTC's powers. Beginning with Section 5, the Court described the FTC as acting "in part quasi-legislatively and in part quasi-judicially" when it "fill[ed] in and administer[ed] the details embodied by th[e] general standard" of "unfair methods of competition."[291] Moving onto Section 6, the Court stated that the FTC, "[i]n making investigations and reports thereon for the information of Congress . . . , in aid of the legislative power, . . . acts as a legislative agency."[292] Finally, the Court said that as to Section 7, "which authorizes the commission to act as a master in chancery under rules prescribed by the court, [the FTC] acts as an agency of the judiciary."[293] To be sure, the Court acknowledged that the FTC might exercise some "executive function—as distinguished from executive power in the constitutional sense," but it clarified that the agency "does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government."[294] As an example, the Court stated in a footnote that the provision allowing the President to direct the Commission to investigate and report on alleged antitrust violations is "so obviously collateral to the main design of the act" that it should not "detract from the force of [its] general statement as to the character of that body."[295] The Court saw the FTC as "wholly disconnected from the executive department."[296] Harmonizing its opinion with that of *Myers*, the Court explained that "the authority of Congress to condition the power by fixing a definite term and precluding a removal

288. *Id.*
289. *Id.* at 627–28.
290. *Id.* at 628.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* The Court acknowledged that its ruling would be the same in a case involving the ICC removal protections. *See id.* at 629.
295. *Id.* at 628 n.1.
296. *Id.* at 630.

except for cause[] will depend upon the character of the office"—a rule that led, in *Humphrey's Executor*, to a result that was different than the one reached in *Myers*, which the Court described as being "confined to purely executive officers."[297]

A couple of decades later, in *Wiener v. United States*, the Court extended *Humphrey's Executor* when it held that a member of the War Claims Commission enjoyed protection from presidential removal despite no explicit statutory language providing as much.[298] Applying *Humphrey's Executor*, the Court reasoned that "the nature of the function that Congress vested in the War Claims Commission"—which was, as the Court saw it, "an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination 'not subject to review by any other official of the United States or by any court by mandamus or otherwise'"—compelled a determination that the statute implied removal protection.[299]

But is *Humphrey's Executor*, standing alone, still good law? Unclear. The holding of the case was that the tenure protections in the FTC Act of 1914—a particular statutory scheme—were constitutional. Since *Humphrey's Executor*, the Court has not overruled that specific holding. But the Court has since moved away from *Humphrey's Executor*'s reasoning. In *Morrison v. Olson*, the Court confronted the question whether Congress had unconstitutionally insulated a special prosecutor from presidential removal in the Ethics in Government Act of 1978.[300] The Act provided for the appointment of an independent counsel "to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws."[301] Because this prosecutor could not fairly be described as a quasi-judicial or quasi-legislative officer, *Humphrey's Executor* was not squarely applicable.[302] So, in upholding the constitutionality of the tenure protections in the Act, the Court charted a new course.

The *Morrison* Court recast *Humphrey's Executor* and *Wiener*'s analysis as not "designed . . . to define rigid categories of those officials who may or may not be removed at will by the President."[303] Instead of focusing on categories, the Court explained that "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."[304] So, even though "the functions performed by the

297. *Id.* at 631–32.
298. *See* Wiener v. United States, 357 U.S. 349, 356 (1958).
299. *Id.* at 353–55 (quoting 50 U.S.C. § 4109).
300. *See* Morrison v. Olson, 487 U.S. 654, 659–60 (1988).
301. *Id.* at 660.
302. *See id.* at 689–92.
303. *Id.* at 689.
304. *Id.* at 691.

independent counsel [were] 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch," the Court concluded that the removal provisions were constitutional because "the independent counsel is an inferior officer . . . with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."[305] The Court further explained that restricting removal for "good cause"—as the Act did for the independent counsel—did not "impermissibly burden[] the President's power to control or supervise the independent counsel" because it still allowed an executive branch official (in this instance, the Attorney General) "to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."[306]

In a key footnote for this Article's purposes, the Court "note[d] by way of comparison that various federal agencies whose officers are covered by 'good cause' removal restrictions exercise civil enforcement powers that are analogous to the prosecutorial powers wielded by an independent counsel."[307] Here, the Court cited 15 U.S.C. § 45(m), which gave "the FTC the authority to bring civil actions to recover civil penalties for the violations of rules respecting unfair competition."[308] But, as will be discussed in Part II.D, this provision postdated the Court's decision in *Humphrey's Executor* by about twenty-five years and was not part of the statutory scheme that the Court evaluated when it decided the case. Moreover, the Court also cited 15 U.S.C. §§ 2061, 2071, and 2076(b)(7)(A), which gave "the Consumer Product Safety Commission the authority to obtain injunctions and apply for seizure of hazardous products."[309] Notably, the Court did not—in drawing this comparison—hold that removal protections that existed in conjunction with these provisions were constitutional. Nor was that issue before the Court. The Court merely compared the Ethics in Government Act to these other two statutory schemes.

In the modern era, the Justices have debated the status of *Humphrey's Executor* in light of *Morrison*. This debate was on display in *Seila Law LLC v. CFPB*. Representing one side of the disagreement was Chief Justice Roberts's majority opinion. The majority stated that the Court takes *Humphrey's Executor* "on its own terms, not through gloss added by a later Court in dicta."[310] In that light, *Humphrey's Executor* established one of two exceptions to the general presidential removal power that *Myers* recognized. As the Chief Justice

305. *Id.*

306. *Id.* at 692.

307. *Id.* at 692 n.31.

308. *Id.* To be sure, the Court's own description of this statutory provision was incorrect. 15 U.S.C. § 45(m) provides for civil penalties for violations of rules *and* cease and desist orders respecting *unfair or deceptive acts or practices*—not unfair methods of competition. *See* 15 U.S.C. § 45(m).

309. *Morrison*, 487 U.S. at 692 n.31.

310. Seila L. LLC v. CFPB, 591 U.S. 197, 219 n.4 (2020).

explained, "*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."[311] Meanwhile, as the majority saw it, *Morrison* stands for "a second exception for inferior officers."[312] So, although the *Morrison* Court "[b]ack[ed] away from the reliance in *Humphrey's Executor* on the concepts of 'quasi-legislative' and 'quasi-judicial' power," the majority in *Seila Law* still understood *Humphrey's Executor* as creating an exception "for multimember expert agencies that do not wield substantial executive power."[313] Meanwhile, in Justice Kagan's view, "*Morrison* both extended *Humphrey's* domain and clarified the standard for addressing removal issues" by calling on courts to evaluate the relationship between the tenure protection and the President's ability to perform his constitutional duty.[314]

D. Congress Changes the Character of the FTC

The Supreme Court decided *Humphrey's Executor* on the basis of the FTC as it functioned in 1935. That agency no longer exists. Since 1935, Congress has amended the FTC Act of 1914 numerous times. Many of these amendments have conferred new powers onto the FTC. Perhaps the most consequential amendment was Congress's expansion of the FTC's jurisdiction to unfair or deceptive acts or practices (UDAP) and Congress's empowerment of the Commission to issue substantive UDAP rules.[315] Or maybe the biggest change came when Congress authorized the FTC to seek civil penalties—as opposed to mere injunctions to enforce cease and desist orders—through affirmative litigation in the absence of internal adjudication.[316] Indeed, the FTC can now bring its own cases as a party in federal court (instead of merely adjudicating controversies itself and seeking enforcement of the resulting orders from a court).[317] At bottom, the statutory scheme evaluated by the Court in *Humphrey's Executor* has changed in a meaningful way.

Recall what Congress did when it created the FTC in 1914. The agency was—and remains—a multimember commission composed of commissioners from different political parties.[318] Sections 5 through 7 of the FTC Act of 1914 established the agency's main powers.[319] In Section 5, Congress declared

311. *Id.* at 216.
312. *See id.* at 217 (emphasis omitted).
313. *Id.* at 217–18.
314. *Id.* at 279 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).
315. *See* discussion *infra* Part II.D.1.
316. *See* discussion *infra* Part II.D.1–3.
317. *See* discussion *infra* Part II.D.2–3.
318. Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 1, 38 Stat. 717, 717–18.
319. *See id.* §§ 5–7.

"unfair methods of competition" to be unlawful.[320] Congress created a process by which the agency would adjudicate violations of the standard, after which the agency would issue a cease and desist order.[321] These powers were similar to those of the Interstate Commerce Commission, and the FTC could only enforce the resulting orders with the help of a federal court injunction.[322] In Section 6, Congress gave investigatory and reporting powers to the agency—an outgrowth of the old Bureau of Corporations's authorities.[323] And in Section 7, Congress gave another quasi-judicial power to the FTC: the power to act as a master in chancery for equity cases involving antitrust laws.[324] The modern FTC can do far more.

1. The Wheeler-Lea Act

The first major change came to the FTC in 1938, just three years after the Court decided *Humphrey's Executor*. That year, Congress passed the Wheeler-Lea Act and expanded both the FTC's jurisdiction and the penalties available to the agency.[325] The headliner from that statute was Congress's amendment of Section 5 to outlaw "unfair or deceptive acts or practices in commerce" in addition to unfair methods of competition—a significant enlargement of the agency's purview.[326] But other provisions were important, too. Most notably, the Act "put[] some teeth into the orders of the . . . Commission."[327] In the law, Congress provided that the FTC's cease and desist orders would become final either sixty days after their issuance or—if challenged in the courts—after a reviewing court's judgment became final.[328] That meant that "orders of the Federal Trade Commission . . . bec[a]me enforceable without judicial action if there [wa]s no appeal to an article III court."[329] The Act then provided for civil

320. *Id.* § 5.

321. *Id.*

322. *See id.*

323. *Id.* § 6.

324. *Id.* § 7.

325. *See* Wheeler-Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111.

326. *Id.* sec. 3, § 5. This provision was enacted in response to the Supreme Court's decision in *FTC v. Raladam Co.*, in which the Court held that a Section 5 violation required "the existence of present or potential competitors" and harm (or the prospect of harm) to these competitors. *See* FTC v. Raladam Co., 283 U.S. 643, 649 (1931). *See also* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 12 n.68 (2006) ("Congress superseded *Raladam* with the Wheeler-Lea Amendment . . . ."). As the Court explained: "Unfair trade methods are not *per se* unfair methods of *competition*." *Raladam*, 283 U.S. at 649. That was consistent with the view of George Rublee at the time of the FTC Act's passage; Rublee had written "that there was no intention to cover merely deceptive or dishonest practices by the prohibition of unfair methods of competition." Rublee, *supra* note 140, at 117.

327. Legislation, *The Federal Trade Commission Act of 1938*, 39 COLUM. L. REV. 259, 270 (1939) [hereinafter *FTC Act of 1938*].

328. Wheeler-Lea Act sec. 3, §§ 5(c)–(g).

329. Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 217 n.130.

penalties of up to $5,000 per violation of the final order, which the government could recover in a civil action.[330]

Recovering penalties for Section 5 violations was not the only new power made available to the FTC. In a newly established Section 12 of the FTC Act, the 1938 law outlawed false advertising of food, drugs, devices, and cosmetics.[331] Congress gave power to the FTC in a new Section 13 to bring its own suit—independent of the Attorney General—in federal court to obtain a temporary injunction before even adjudicating a potential violation or issuing a cease and desist order.[332] Section 14 then provided for financial penalties or imprisonment for certain violations of the false advertising provision.[333] And in a newly created Section 16, Congress provided:

> Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under [the new penalty subsection of] section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.[334]

Prior to 1938 (including when the Court decided *Humphrey's Executor*), "[t]here was no penalty for violating" a cease and desist order.[335] Any punishment would be for contempt of the reviewing court's order after said court had affirmed the FTC's order, "not strictly for violation of the Commission's order."[336] The Act thus transformed the FTC's orders into penalty-backed commands. Still, Section 16 kept a meaningful limitation on the FTC's power: it had to go to the Attorney General, to whom the statute gave the duty of actually bringing the suit to recover a penalty.[337]

Finally, among other provisions, the Act provided "[t]hat upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified."[338] Several years later, in 1950, Congress would again tinker with the agency's structure. That year, Congress transferred the power of choosing the FTC chairman from the membership of the Commission to the President.[339] Given the "administrative

330. *See* Wheeler-Lea Act sec. 3, § 5(*l*).

331. *See id.* sec. 4, § 12.

332. *See id.* sec. 4, § 13; *see also* Crane, *Debunking* Humphrey's Executor, *supra* note 6, at 1864–65 ("The Wheeler-Lea Amendments of 1938 granted the FTC new powers to act as a party-litigant in federal district court.").

333. Wheeler-Lea Act sec. 4, § 14.

334. *Id.* sec. 4, § 16.

335. *See FTC Act of 1938*, *supra* note 327, at 270.

336. *Id.*

337. Wheeler-Lea Act sec. 4, § 16.

338. *Id.* sec. 1, § 1.

339. *See* Reorganization Plan No. 8 of 1950, 3 C.F.R. 166 (1950), *reprinted in* 5 U.S.C. app. at 648 (2018), *and in* 64 Stat. 1264 (1950).

control" of the chairman (which Congress "expanded in 1961"), and the fact that the Chairman would hold "his position at the pleasure of the President," Congress can be said to have "expanded" "[t]he President's own influence over the Commission" with these changes.[340]

2. The Trans-Alaska Pipeline Authorization Act

Congress amended the FTC Act again in 1973. The amendments were part of a larger piece of legislation authorizing a trans-Alaska oil pipeline.[341] In the section entitled "Federal Trade Commission Authority," Congress noted its finding "that the investigative and law enforcement responsibilities of the Federal Trade Commission ha[d] been restricted and hampered because of inadequate legal authority to enforce subpenas [sic] and to seek preliminary injunctive relief to avoid unfair competitive practices."[342] Congress thus continued its transformation of the once-quasi-judicial and quasi-legislative agency by "grant[ing] the Federal Trade Commission the requisite authority to insure [sic] prompt enforcement of the laws the Commission administers by granting statutory authority to directly enforce subpenas [sic] issued by the Commission and to seek preliminary injunctive relief to avoid unfair competitive practices."[343]

To start, Congress amplified the penalties for noncompliance with FTC orders from $5,000 to $10,000.[344] Moreover, Congress added a new subsection to Section 5, authorizing the FTC "to appear in its own name"—as opposed to the Justice Department—in civil suits.[345] Also, the amendments provided that a court could go past a temporary injunction and issue a *permanent* injunction "in proper cases."[346] Additionally, the 1973 statute removed a key limitation in Section 16 (which came about as a result of the 1938 law). Here, Congress

340. A. Everette MacIntyre & Joachim J. Volhard, *The Federal Trade Commission*, 11 B.C. INDUS. & COM. L. REV. 723, 742–43 (1970).

341. *See generally* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (1973) (authorizing a trans-Alaska oil pipeline and amending the FTC Act).

342. *Id.* § 408(a).

343. *Id.* § 408(b); *see also* David C. Vladeck, *The Erosion of Equity and the Attack on the FTC's Redress Authority*, 82 MONT. L. REV. 159, 159 (2021) ("For most of its century-long history, the Federal Trade Commission . . . lacked the authority to go directly to court to stop scams and compel wrongdoers to give up their ill-gotten gains. The Commission's only enforcement tool was a 'cease and desist' order, issued after an administrative hearing and Commission review, and, in many cases, after judicial review. When a company violated a cease and desist order, the FTC could ask the Attorney General to bring suit to challenge violations of the order, but it could not obtain any redress for consumers injured by the initial violation of law. In other words, scammers could escape with the fruits of their violation, making the initial violation of the Federal Trade Commission Act . . . profitable. By 1973, Congress decided it was time to give the FTC enforcement tools like those it had granted other consumer protection agencies." (emphasis omitted) (footnote omitted)).

344. *See* Trans-Alaska Pipeline Authorization Act sec. 408(c), § 1.

345. *Id.* sec. 408(d), § 5(m).

346. *Id.* sec. 408(f), § 13; *see also* Crane, *Debunking* Humphrey's Executor, *supra* note 6, at 1865 ("[This] proviso . . . , with time, would become the rule rather than the exception . . . .").

allowed the FTC to bring its own civil actions when it had "reason to believe that any person, partnership, or corporation [wa]s liable to a penalty under section 14 or under [the penalty subsection] of section 5."[347] This change fixed "perhaps the weakest link in the Commission's enforcement chain"—the delay between the FTC determining that a penalty was warranted and the Justice Department taking action.[348]

3. The Magnuson-Moss Warranty Act

One more statute is noteworthy: the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act of 1975. Before discussing the statute, some background is helpful. By the 1970s, the FTC had started to venture into legislative rulemaking.[349] Several post-1935 statutes had granted limited rulemaking power to the agency. That included a 1967 amendment to the Flammable Fabrics Act, which decreed that a violation of a rule promulgated pursuant to the Act would be an unfair method of competition.[350] Without a firm grounding in statutory authority, the FTC nevertheless began issuing Trade Regulation Rules ("TRRs") in 1962—rules that it "intend[ed] to treat . . . as legislative regulations."[351] When the FTC attempted to regulate tobacco advertising in "its first major, controversial TRR," Congress chafed at the agency's assertion of such an authority and quickly abrogated the rule through legislation.[352]

Before Congress could clarify whether the FTC even had legislative rulemaking power, the D.C. Circuit opined that it indeed had such power all along. In *National Petroleum Refiners Association v. FTC*, the court decided that the FTC had always had legislative rulemaking power—under Section 6 of the original FTC Act.[353] As noted earlier, Section 6 of the Act had largely ported over a version of the Bureau of Corporations's old powers into the new agency.[354] Tucked within Section 6 was subsection (g), which, as discussed above, empowered the FTC "to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of [the FTC] Act."[355] One interpretation of this provision was that it conferred the power "to

347. *Id.* sec. 408(g), § 16 ("[The agency] shall (a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection; or (b) after compliance with the requirements with section 5(m), *itself cause* such appropriate proceedings to be brought." (emphasis added)).

348. MacIntyre & Volhard, *supra* note 340, at 748.

349. *See* Merrill & Watts, *supra* note 232, at 552–54.

350. *See id.* at 550.

351. *Id.* at 552.

352. *Id.* at 553–54.

353. *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 697–98 (D.C. Cir. 1973).

354. *See supra* notes 198–200 and accompanying text.

355. Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722.

promulgate procedural, as opposed to substantive, rules for administration of the Section 5 adjudication and enforcement powers."[356] Eschewing that understanding of the law, the D.C. Circuit decided "liberally to construe the term 'rules and regulations'" and hold that Section 6(g) "permit[s] the Commission to promulgate binding substantive rules."[357]

Commentators have criticized the decision as contrary to congressional intent[358] and inconsistent "with the universal belief of the FTC, Congress, courts, and scholars for the first 48 years of the existence of the agency that it lacked that power."[359] Moreover, as Richard Pierce opines, the case's "method of statutory interpretation . . . was never embraced by the Supreme Court . . . and no court has used it in decades."[360] Furthermore, one federal court recently disagreed with *National Petroleum* on the Section 6(g) point, determining that the D.C. Circuit's approach would render several late-1960s amendments to the FTC Act (which "expressly allow[ed] force of law rulemaking related to specific subjects") superfluous.[361]

Not long after the D.C. Circuit handed down its decision, Congress legislated on the issue. In Magnuson-Moss, enacted in 1975, Congress laid out a detailed rulemaking process—a newly established Section 18 of the FTC Act—for whenever the FTC wanted to "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[362] Congress explicitly required the FTC to observe the procedural strictures of Section 18 when engaging in UDAP rulemaking.[363] As to the question of a power to make rules regarding unfair methods of competition, Congress simply stated that the restriction "shall not affect any authority of the Commission to prescribe rules (including interpretive rules) . . . with respect to unfair methods of competition in or affecting commerce."[364] To be sure, the Court in *Humphrey's Executor* "did not mention the rulemaking grant in section 6(g)" when discussing the FTC's power, "presumably because the litigants in the case—and the Court itself—assumed that this provision did not confer any power on the FTC to make legislative rules."[365]

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356. *Nat'l Petroleum Refiners Ass'n*, 482 F.2d at 678.

357. *Id.*

358. *See* Merrill & Watts, *supra* note 232, at 557.

359. Richard J. Pierce, Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?* 6 (GW Legal Studs. Rsch. Paper No. 42, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3933921.

360. *Id.*; *see also* Crane, *FTC Independence After* Seila Law, *supra* note 7 ("Despite the D.C. Circuit's *National Petroleum Refiners* decision, whether the FTC in fact has that power remains subject to question.").

361. Ryan LLC v. FTC, 739 F. Supp. 3d 496, 513 (N.D. Tex. 2024).

362. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, sec. 202(a), § 18(a)(1)(B), 88 Stat. 2183, 2193 (1975).

363. *Id.*

364. *Id.* sec. 202(a), § 18(a)(2).

365. Merrill & Watts, *supra* note 232, at 506. *But see* Seila L. LLC v. CFPB, 591 U.S. 197, 287 n.10 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) ("[T]he FTC has always had statutory rulemaking authority, even though (like several other agencies) it relied on adjudications

Magnuson-Moss added more penalties, too. First, Congress provided for up to $10,000 worth of penalties for each violation of a UDAP rule.[366] Second, the law established that once the FTC issued a cease and desist order as to an act or practice, the Commission could "commence a civil action to obtain a civil penalty [of up to $10,000] . . . against *any* person, partnership, or corporation which engages in such act or practice"—even if that entity was not the subject of the order.[367] Third, Congress added a new section (Section 19) to the FTC Act, allowing the Commission to seek consumer redress—such as "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice"—for either violating UDAP rules or for engaging in unfair or deceptive acts or practices that "a reasonable man would have known under the circumstances w[ere] dishonest or fraudulent."[368]

The law also continued Congress's expansion of the FTC's independent litigating power. Prior to 1938, the FTC could not assess monetary penalties for violations of its cease and desist orders. In Wheeler-Lea, Congress added Section 16 to the FTC Act, which required the Attorney General to bring suits to enforce the penalty provisions that the 1938 law added.[369] In 1973, Congress allowed the FTC to bring such proceedings itself.[370] Then, in Magnuson-Moss, Congress again amended Section 16 to allow the FTC to "commence, defend, or intervene in, and supervise the litigation of" "*any* civil action involving [the FTC] Act (including an action to collect a civil penalty)," with certain noted exceptions.[371]

4. A New Agency

The modern Federal Trade Commission has substantially more powers than the agency did in 1935.[372] The Supreme Court described the agency's duties back then as "neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[373] As of 1935, the Court determined that the Commission was "charged with the enforcement of no policy except the policy

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until the 1960s. (The majority's reply that a court including Charles Evans Hughes, Louis Brandeis, Benjamin Cardozo, and Harlan Stone somehow misunderstood these powers lacks all plausibility.)" (citations omitted)).

366. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act sec. 205(a), § 5(m)(1)(A).

367. *Id.* sec. 205(a), § 5(m)(1)(B) (emphasis added).

368. *Id.* sec. 206(a), § 19(a)(2).

369. *See* Wheeler-Lea Act of 1938, Pub. L. No. 75-447, sec. 4, § 16, 52 Stat. 111, 116–17.

370. *See* Crane, *Debunking* Humphrey's Executor*, supra* note 6, at 1864–65.

371. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act sec. 204, § 16(a)(1)(A) (emphasis added).

372. *See* Mistretta v. United States, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting) (describing the FTC evaluated in *Humphrey's Executor* as "the old Federal Trade Commission, before it acquired many of its current functions").

373. Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935).

of the law."[374] But if that is correct, then Congress has fundamentally changed the agency's duties through Wheeler-Lea, the Alaska pipeline legislation, and Magnuson-Moss. The FTC of 2025 is one that can bring its own civil actions in federal court to recover financial penalties for violations of its orders and rules. In 1935, the FTC would adjudicate complaints before itself as a quasi-judicial tribunal—like the ICC before it. It would issue cease and desist orders as to individuals, but enforcing those orders required going to federal court, and even then the remedy was only injunctive. Now, the FTC can go after third parties who engage in the practices described in cease and desist orders—without resorting to internal adjudication first. And although the *Humphrey's Executor* Court seemed to assume that the FTC could not engage in rulemaking to flesh out the meaning of "unfair methods of competition" (which may have been the correct interpretation of the FTC Act of 1914), the modern FTC unquestionably has the power to issue such rules with respect to "unfair or deceptive acts or practices." The agency that the Court evaluated in *Humphrey's Executor* no longer exists.

III. THE PRESIDENT CAN REMOVE FTC COMMISSIONERS AT WILL

Some have criticized *Humphrey's Executor* and urged its overruling.[375] This Article takes no position on whether *Humphrey's Executor* was rightly decided. Rather, this Article works within the current framework of Supreme Court case law and submits the following: Consistent with Supreme Court precedent, the President can remove FTC commissioners at will. That is because *Humphrey's Executor* upheld the constitutionality of the FTC Act's removal protections based on the FTC exercising a different set of powers than it exercises today. The holding in *Humphrey's Executor* depended on the FTC's nature as a quasi-legislative and quasi-judicial agency whose exercise of executive functions was collateral to its work as an agency of the legislative and judicial branches. That may have been true of the FTC in 1935, but it is not true of the FTC in the modern era. Thus, if the President removed an FTC commissioner today, he would not be contravening Supreme Court precedent, and a court should uphold the removal.

This argument proceeds in several steps. This Part walks through each of them. *First*, the Supreme Court's removal jurisprudence establishes that the

374. *Id.*

375. *See, e.g.*, Andrew M. Grossman & Sean Sandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, 22 FEDERALIST SOC'Y REV. 216, 223–24 (2021); Seila L. LLC v. CFPB, 591 U.S. 197, 240–41 (2020) (Thomas, J., concurring in part and dissenting in part); *In re* Aiken Cnty., 645 F.3d 428, 441–42 (D.C. Cir. 2011) (Kavanaugh, J., concurring); Morrison v. Olson, 487 U.S. 654, 724 (1988) (Scalia, J., dissenting) (describing *Humphrey's Executor* as "considered by many at the time the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt"); Daniel J. Gifford, *The Separation of Powers Doctrine and the Regulatory Agencies After* Bowsher v. Synar, 55 GEO. WASH. L. REV. 441, 459 (1987).

removal provisions in the FTC Act of 1914—as the statutory scheme existed in 1935—are constitutional. *Second*, the Court's holding in *Humphrey's Executor* applies to FTC commissioners whose duties are "predominantly quasi-judicial and quasi-legislative," not to FTC commissioners in perpetuity. *Third*, the duties of the FTC's commissioners can no longer be described as "predominantly quasi-judicial and quasi-legislative"; thus, *Humphrey's Executor* no longer applies. *Fourth*, the removal protections in the FTC Act are now unconstitutional because they contravene Article II. For these reasons, the President can remove FTC commissioners at will right now. This Part addresses each issue in turn.

The President can fire a commissioner of the FTC without contravening any Supreme Court precedent—not *Humphrey's Executor*, not *Wiener*, not *Morrison*. If the President were to make such a removal, and if the fired commissioner were to sue for her or his job back, a federal court should uphold the removal as lawful. The removal provisions in the FTC Act conflict with Article II of the Constitution, and Article II must prevail. *Humphrey's Executor* does not disturb this conclusion. Although that decision held that the FTC Act's removal provisions were valid and did not conflict with Article II, the Court's ruling is no longer applicable. That is because the FTC's duties—on which the Court based its holding—are different today than they were in 1935.

*A. The Contours of the "*Humphrey's Executor *Exception"*

The Court has struggled to make full sense of the removal power line of cases. But however one slices it, the specific holding of *Humphrey's Executor*—that the FTC Act of 1914's removal protections were constitutional against the backdrop of the statute as it stood in 1935[376]—remains an existing precedent of the Supreme Court that has not been explicitly overruled. Relatedly, the Court's removal jurisprudence leaves a *Humphrey's Executor*-sized gap in the President's removal power. *Myers* established that "the power of appointment to executive office carries with it, as a necessary incident, the power of removal."[377] The Court in *Humphrey's Executor* then distinguished *Myers* by describing the case as being about "an executive officer restricted to the performance of executive functions."[378] In contrast, the FTC commissioners at the time "occupie[d] no place in the executive department and . . . exercise[d] no part of the executive power vested by the Constitution in the President," because "the commission act[ed] in part quasi-legislatively and in part quasi-judicially" through its powers in Sections 5 through 7.[379] *Morrison* then recast *Humphrey's Executor* as being about "whether the removal restrictions are of such

376. *Humphrey's Ex'r*, 295 U.S. at 632.
377. Myers v. United States, 272 U.S. 52, 126 (1926).
378. *Humphrey's Ex'r*, 295 U.S. at 627.
379. *Id.* at 628.

a nature that they impede the President's ability to perform his constitutional duty."[380]

Seila Law later noted *Humphrey's Executor* as one of two exceptions to the presidential removal power for "expert agencies led by a *group* of principal officers removable by the President only for good cause."[381] The opinion, however, described "the *Humphrey's Executor* exception [as] depend[ing] upon the characteristics of the agency before the Court."[382] The *Seila Law* Court suggested that the *Humphrey's Executor* Court may have been wrong when it concluded that the FTC of 1935 exercised "no part of the executive power," but it made no definitive assertion on the point.[383] The confusion arises partly because the Court in a recent case—*City of Arlington v. FCC*—stated that agencies' "activities [may] take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'"[384]

Still, without a conclusive assertion from the Court itself of its wrongness in *Humphrey's Executor*, this Article assumes for the purpose of discussion that the Court was correct: as of 1935, neither the agency's adjudicative powers under Section 5, nor its investigative and report-making powers under Section 6, nor its equitable-master powers under Section 7 constituted executive powers as the Court understood the term "executive power." Perhaps this interpretation conflicts with *City of Arlington*, but the Court has not formally overruled *Humphrey's Executor*, so its conclusion about the executive nature of those three powers in particular could be sui generis and distinguishable. Or, at the absolute least, the Court's approach in *Humphrey's Executor* has been subsumed into the new *Morrison* inquiry about agency functions.[385] And because, in the Court's view, the President need not oversee the exercise of the 1935 FTC's quasi-judicial and quasi-legislative powers (whether "executive" or not) to perform his constitutional duty, *Morrison* does not disturb the conclusion that the holding of *Humphrey's Executor*, which relied on those particular powers, is still operative.[386] Those powers—which one could conclude are on the

380. *Morrison*, 487 U.S. at 691.

381. Seila L. LLC v. CFPB, 591 U.S. 197, 204 (2020).

382. *Id.* at 215.

383. *Id.* (quoting *Humphrey's Ex'r*, 295 U.S. at 628).

384. 569 U.S. 290, 305 n.4 (2013); *see also* Garcia v. Garland, 64 F.4th 62, 70 (2d Cir. 2023) ("[A]gencies are not courts.").

385. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2011 n.367 (2011) ("[T]he Court has since abandoned the novel classifications employed in *Humphrey's Executor*; modern jurisprudence would treat the classic regulatory functions at issue in that case as 'executive.'"); John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1304 n.67 (1999) ("The Court . . . has now reaffirmed *Humphrey's Executor* on the understanding that many of the Commission's functions were, in substance, executive.").

386. *See* Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1783 (2016) ("*Humphrey's Executor* implies that where adjudicative functions are involved, unfettered presidential removal authority is not necessary . . . .").

periphery of executive power, even if they are properly termed executive—may be distinct in the removal power context from seemingly core executive functions like bringing civil litigation in federal court. Again, the point of this Article is to work within the confines of existing Supreme Court precedent. Thus, the removal provisions of the FTC Act of 1914, if included within a statutory scheme identical to that version of the law as it stood in 1935, remain constitutional under Supreme Court precedent.[387]

B. The Reach of Humphrey's Executor

How far does *Humphrey's Executor* go? In the most technical sense, the holding of the case applies only to William Humphrey himself; the government had to pay out his salary for the years that he should have served on the Commission, and it cannot get the money back.[388] But under the principles of stare decisis, the Court's decision must have some applicability to future controversies.[389] Some courts, however, have construed *Humphrey's Executor* too broadly.[390] By its own terms, the decision involves an agency that exercised three particular powers: (1) intra-agency adjudication of a general standard of conduct, toward the end of issuing cease and desist orders that could only be enforced by federal courts and even then only through prospective injunctive relief; (2) corporate investigation and report-making; and (3) service as a master in chancery in certain equitable cases under the supervision of a federal court.[391] The Court did not base its holding on the fact that the agency was named "the Federal Trade Commission." And it cannot be the case that *Humphrey's Executor* applies to the FTC no matter how Congress changes the FTC Act.

An example illustrates the point. In *Morrison*, the Court upheld the tenure protections for the independent counsel that Congress established through the Ethics in Government Act of 1978.[392] The Court emphasized that "the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."[393] So, although "the functions performed by the independent counsel [we]re 'executive' in the sense that they [we]re law enforcement functions that typically ha[d] been undertaken by officials within the Executive Branch," the Court determined that "the President's need to

387. *See* Crane, *FTC Independence After* Seila Law*, supra* note 7, at 15.

388. *See* Winerman & Kovacic, *supra* note 271, at 702 n.2.

389. *Cf.* James Hart, *The Bearing of* Myers v. United States *upon the Independence of Federal Administrative Tribunals,* 23 AM. POL. SCI. REV. 657, 661 (1929) ("In the Myers case the judgment was that the Myers estate could not recover the remainder of the ex-postmaster's salary. If we stopped there, we could never apply *stare decisis*; for the event never repeats itself. Generalization of some sort becomes necessary." (footnote omitted)).

390. *See infra* notes 398–408 and accompanying text.

391. Humphrey's Ex'r v. United States, 295 U.S. 602, 620–21 (1935).

392. Morrison v. Olson, 487 U.S. 654, 696–97 (1988).

393. *Id.* at 691.

control the exercise of that discretion [was not] 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."[394]

Now, suppose that Congress responded to the *Morrison* decision by amending the Ethics in Government Act and adding several new sections to the law. Imagine that on the day after the Court decided *Morrison*, Congress provided that the independent counsel now had concurrent jurisdiction to carry out any federal prosecution in the United States that the Justice Department itself could undertake. Additionally, imagine that Congress provided that any "unethical behavior" by executive branch officials was hereby declared "unlawful," and it allowed the independent counsel to promulgate rules that fleshed out the "unethical behavior" standard. In this hypothetical law, the independent counsel could bring civil actions for violations of those rules and recover $10,000 in civil penalties for each violation.

No one could maintain that *Morrison* still spoke definitively on the constitutionality of the still-in-place removal provisions. The decision was based in part on the "limited jurisdiction" of the independent counsel and her lack of "policymaking . . . authority."[395] In the hypothetical, Congress has departed from the core justifications of *Morrison*. The fact that the amendments occurred to the Ethics in Government Act are of no practical import; the amendments changed the law in ways that would undermine the basis for the Court's ruling in *Morrison*.

The same is true for the applicability of *Humphrey's Executor*. The ruling applies to a particular kind of agency: "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid."[396] Evaluating the functions of that specific type of agency, the Court concluded that the tenure protections would not unduly trammel on the President's executive authority.[397] That holding reflected a careful balancing between the presidential power acknowledged in *Myers* and the interests in independence that *Humphrey's Executor* and *Morrison* recognized. But the balancing was particular to the FTC as it existed in 1935. Thus, to contend that the balance comes out the same way with respect to the modern FTC, one would need to analogize the modern agency's functions to the description of the *Humphrey's Executor* Court as to the FTC of 1935.

One federal court's recent analysis demonstrates the analytical problem. In *FTC v. Syngenta Crop Protection AG*, the Middle District of North Carolina

394. *Id.* at 691–92.
395. *Id.* at 691.
396. *Humphrey's Ex'r*, 295 U.S. at 628.
397. *Id.*

evaluated one litigant's contention that the FTC's removal protections are unconstitutional.[398] The FTC had brought suit under Section 13(b) of the FTC Act—a section of the FTC Act that Congress added after the Court decided *Humphrey's Executor*.[399] As described earlier, this section allows the FTC to bring its own lawsuits (in advance of filing a complaint for internal adjudication) and obtain injunctive relief in federal court for violations or prospective violations of the FTC Act.[400] The court in *Syngenta* acknowledged that Congress added the Section 13(b) authority "decades after the Court decided *Humphrey's Executor* in 1935," and it agreed with the challenger that "section 13(b) is executive in nature."[401] But the court concluded that "*Humphrey's Executor* directly addresses whether Congress may restrict the removal power of FTC commissioners," so it could not rule in the challenger's favor.[402] The same is true of Justice Kagan's dissent in *Seila Law*, in which she claimed that "the present-day FTC . . . remains independent even if it now has some expanded powers—and . . . remains constitutional under not only *Humphrey's* but also *Morrison*" without evaluating *how* the expanded powers might change the applicability of the cases.[403] As the *Morrison* hypothetical demonstrates, this theory of stare decisis and *Humphrey's Executor* (as applying to the FTC no matter what Congress does to the agency's powers) is untenable.

The agency's powers were front and center in the Court's analysis in *Humphrey's Executor*. True, the Court in *Seila Law* described the *Humphrey's Executor* decision as representing an exception for "expert agencies led by a *group* of principal officers removable by the President only for good cause."[404] Aditya Bamzai and Saikrishna Prakash contend that *Seila Law* is amenable of two readings: (1) recognizing an exception for "an agency with *functions* like those of the Federal Trade Commission . . . at the time *Humphrey's Executor* was decided in 1935" or (2) establishing that "multimember agencies might generally be constitutional, regardless of their functions."[405] Taking the latter approach, the Fifth Circuit recently upheld the constitutionality of the removal protections afforded to members of the Consumer Product Safety Commission.[406] Interpreting the decision of a prior panel, the court concluded that *Seila Law* stood for the proposition that "[p]rincipal officers may retain for-cause

398. 711 F. Supp. 3d 545, 586 (M.D.N.C. 2024).

399. *See id.*

400. *See* 15 U.S.C. § 53(b).

401. *Syngenta*, 711 F. Supp. 3d at 588.

402. *Id.* at 589.

403. Seila L. LLC v. CFPB, 591 U.S. 197, 286 n.10 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

404. *Id.* at 204 (majority opinion).

405. Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1835–36 (2023).

406. *See* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 91 F.4th 342, 355–56 (5th Cir. 2024), *reh'g en banc denied*, 98 F.4th 646 (5th Cir. 2024).

protection when they act as part of an expert board."[407] The Supreme Court denied certiorari, so the Fifth Circuit's ruling is now the settled precedent of the circuit.[408]

The Fifth Circuit's decision notwithstanding, the more faithful reading of *Seila Law* against the backdrop of *Humphrey's Executor* and *Morrison* is that the multimember nature of the board is a threshold requirement for *Humphrey's Executor* to apply. The *Seila Law* Court was simply unwilling to consider applying *Humphrey's Executor* to the agency before it—a single-director bureau.[409] If the agency was a multimember commission, the Court still would have had to undertake the analysis of "the functions of the officials in question," as *Morrison* instructs.[410] Indeed, that is the best understanding of the prior Fifth Circuit decision that the *Consumers' Research* panel cited for the proposition about multimember boards. In *Jarkesy*, the court applied another presidential removal precedent—*Free Enterprise Fund v. PCAOB*—to hold that two layers of for-cause removal protection for administrative law judges at the Securities and Exchange Commission was unconstitutional.[411] In surveying the contours of the removal power cases, the court determined that "principal officers *may* retain for-cause protection when they act as part of an expert board."[412] Determining that this potential exception was inapplicable in the case of inferior-officer administrative law judges, the court did not analyze it.[413]

Other courts have made similar mistakes in analyzing the upshot of the Court's removal jurisprudence. In one case, the Middle District of Pennsylvania interpreted *Morrison* to mean that "the mere fact that [an agency] may perform certain tasks that could be considered 'executive powers' does not necessarily bring it outside of the holding of *Humphrey's Executor*."[414] But the quintessentially executive powers evaluated in *Morrison* were confined to the limited jurisdiction of the independent counsel—an inferior officer.[415] The Tenth Circuit's opinion in *SEC v. Blinder, Robinson & Co.* warrants some scrutiny, too—there, the court took the view "that *Morrison* is predicated in part upon *Humphrey*[*'s Executor*], which stands generally for the proposition that Congress can, without violating Article II, authorize an independent agency to bring civil law enforcement actions where the President's removal power was

407. *Id.* at 356 (quoting Jarkesy v. SEC, 34 F.4th 446, 463 (5th Cir. 2022)).

408. *See* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 145 S. Ct. 414, 414 (2024) (mem.) (denying certiorari).

409. Seila L. LLC v. CFPB, 591 U.S. 197, 218 (2020).

410. Morrison v. Olson, 487 U.S. 654, 691 (1988).

411. *Jarkesy*, 34 F.4th at 464.

412. *Id.* at 463 (emphasis added).

413. *See id.* at 463–64.

414. Consumer Fin. Prot. Bureau v. Navient Corp., No. 17-CV-101, 2017 WL 3380530, at *15 n.5 (M.D. Pa. Aug. 4, 2017).

415. *Morrison*, 487 U.S. at 691.

restricted to inefficiency, neglect of duty, or malfeasance in office."[416] To the extent that the Tenth Circuit understood the FTC's actions to enforce its post-internal-adjudication cease and desist orders as "civil law enforcement actions," those actions differ substantially from original actions in federal court to recover civil penalties for rule violations.[417]

C. Humphrey's Executor *and the Modern FTC*

The FTC is now an executive agency, and the holding of *Humphrey's Executor* no longer speaks to the constitutionality of the removal protections with which Congress endowed its commissioners. True, the FTC is still a multimember agency. But it is not the "*predominantly* quasi-judicial and quasi-legislative" agency that the Supreme Court evaluated in *Humphrey's Executor*.[418] After multiple major packages of amendments to the FTC Act in the ninety years since the Court decided *Humphrey's Executor*, the agency enjoys all sorts of executive powers that it did not have in 1935.[419] Although the FTC once exercised executive functions "in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government,"[420] the opposite is now true. In sum, "[t]he predominant character of the agency has become that of a traditional law enforcement department."[421]

If the FTC in 1935 wanted to act to carry out its mission, it had a few avenues to do so. *First*, it could adjudicate individual complaints under Section 5 and issue cease and desist orders to prevent persons or businesses from engaging in unfair methods of competition.[422] The agency still would have to go to federal court to enforce the order, and such an action could only get a forward-looking injunction.[423] *Second*, the FTC could undertake investigations of corporations or issue reports for Congress, exposing monopolistic behavior and inspiring change.[424] *Third*, it could serve as a special master in certain

416. 855 F.2d 677, 682 (10th Cir. 1988).

417. *See id.*; consider also the scholarly analysis that appeared in a motion to dismiss by Walmart of a Seventh Circuit decision about the Interstate Commerce Commission. Contending that *Humphrey's Executor* no longer applies to the modern FTC, Walmart described a 1965 case in which "the Seventh Circuit held that the Interstate Commerce Commission could sue for an 'injunction' despite being an independent agency, reasoning that 'the powers of law enforcement are not wholly assigned to the executive department.'" Mot. to Dismiss at 12 n.2, FTC v. Walmart Inc., 664 F. Supp. 3d 808 (N.D. Ill. 2023) (No. 22-CV-03372) [hereinafter Walmart MTD] (quoting ICC v. Chatsworth Coop. Mktg. Ass'n, 347 F.2d 821, 822 (7th Cir. 1965)). In Walmart's view, "that holding . . . does not survive *Seila Law* and *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)], and it does not address claims for monetary relief in any event." *Id.*

418. Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935) (emphasis added).

419. *See* discussion *supra* Part II.D.

420. *Humphrey's Ex'r*, 295 U.S. at 628.

421. Crane, *Debunking* Humphrey's Executor, *supra* note 6, at 1868.

422. *See supra* notes 205–08 and accompanying text.

423. *See supra* notes 209–10 and accompanying text.

424. *See supra* note 198 and accompanying text.

equitable antitrust cases, recommending dispositions to federal courts.[425] Critically, it could not bring its own original civil actions in federal court. It could not recover financial penalties. And even if it was able to engage in rulemaking past its voluntary trade practice conference rules, it chose not to do so until well after 1935, and the Supreme Court in *Humphrey's Executor* appeared implicitly to assume that it could not.[426]

Things are different now. The FTC has an independent litigating power—several provisions in the amended FTC Act allow the agency to bring civil actions in federal court to obtain injunctive relief or even financial penalties.[427] That contravenes the original design of the FTC Act, pursuant to which the agency would first adjudicate complaints (through a defined process that included notice and an opportunity to be heard), then issue a cease and desist order, then go to federal court to compel compliance via an injunction.[428] True, the FTC in 1935 could start the adjudicatory process itself, and it could initiate lawsuits in federal court that—in practice—sought the issuance of injunctions on behalf of the federal government.[429] But these activities were, as the Court in *Humphrey's Executor* put it, "in the discharge and effectuation of [the FTC's] . . . quasi-judicial powers."[430] Put another way, these activities were collateral to the predominant, not-quintessentially-executive powers that the agency exercised. Congress had determined that the FTC could not carry out its quasi-judicial powers without the corollary complaint-bringing and injunction-seeking authorities.[431]

Now, however, the statutory scheme sees the agency's quasi-judicial and quasi-legislative powers as afterthoughts in many instances. Consider, as one example, the recovery of civil penalties for violations of UDAP rules. Suppose that the FTC issues a binding Magnuson-Moss rule to declare a certain practice "deceptive"—something that it had not done, and which the Supreme Court apparently assumed that it could not do for unfair methods of competition, prior to 1935.[432] A party violates the rule, and the FTC—instead of issuing a

425. *See supra* notes 201–02 and accompanying text.

426. Merrill & Watts, *supra* note 232, at 506. *But see* Seila L. LLC v. CFPB, 591 U.S. 197, 286 n.10 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

427. *See supra* notes 333–34 and accompanying text.

428. Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719–21.

429. *Id.*

430. Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935); *see also* Robert E. Freer, *The Case Against the Trade Regulation Section of the Proposed Administrative Court*, 24 GEO. WASH. L. REV. 637, 641 (1956) ("The power to adjudicate under Section 5 . . . is the basic power from which all of the other actions of the Federal Trade Commission draw their vitality.").

431. *Cf.* Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 481–82 (1979) (describing *Humphrey's Executor* as possibly "rest[ing] in large part upon a procedural value—the necessity of recognizing congressional power to protect officers engaged in adjudication from summary removal without cause" and concluding that "[t]his is a clearly appropriate ground for recognizing congressional power to restrict removals").

432. Merrill & Watts, *supra* note 232, at 506. *But see* Seila L. LLC v. CFPB, 591 U.S. 197, 286 n.10 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

complaint and carrying out an internal adjudication—proceeds directly to federal court in search of civil penalties. In this instance, the FTC has acted in ways that the Court in *Humphrey's Executor* did not bless. And, as Part II.D illustrates, "[l]egislative changes within three years of the *Humphrey's Executor* decision began a trend that gradually reduced the FTC's adjudicatory character significantly."[433] Daniel Crane notes that "adjudication is a very small part of what the agency does" now, and "the FTC has essentially become the executive agency that the *Humphrey's Executor* Court denied it was."[434]

Still, *Humphrey's Executor* remains on the books and must be followed until overruled. To give an example of what that might look like, imagine that Congress creates a new multimember commission tomorrow: the Ethics Commission ("EC"). In the agency's organic act, Congress declares all "unethical conduct in or affecting commerce" to be unlawful. It provides a detailed process by which the EC can adjudicate violations of the "unethical conduct" standard, case by case. Those adjudications culminate in the issuance of a cease and desist order, and the EC can go to federal court to compel compliance with an order by way of an injunction. Congress then insulates the EC's commissioners from presidential removal. *Humphrey's Executor* (and *Morrison*) speaks to the constitutionality of those removal protections: Under Supreme Court precedent, these restrictions are valid and do not conflict with Article II.[435] But the same cannot be said for the modern FTC, whose powers far exceed (and tend far more toward core executive authority than) the ones that the FTC possessed in 1935.

D. Article II and the FTC Removal Protections

With *Humphrey's Executor* out of the way, no Supreme Court precedent speaks directly to the question whether the FTC's removal protections—as of 2025—are constitutional. The question is whether the President's powers under Article II of the Constitution supersede the statutory removal protections. If they do, then the President can remove the FTC commissioners notwithstanding the statutory text, and a federal court would be obliged to uphold such a firing as consistent with the higher law. Under current Supreme Court precedent, the President can indeed remove FTC commissioners. The commissioners are principal officers who exercise core executive power; their continued insulation from presidential removal is now at odds with the Constitution.

In *Myers*, the Supreme Court recognized a background presumption in favor of a presidential removal power.[436] *Seila Law* confirmed that "[t]he

433. Crane, *FTC Independence After* Seila Law, *supra* note 7, at 24.

434. Crane, *Debunking* Humphrey's Executor, *supra* note 6, at 1839.

435. *See Humphrey's Ex'r*, 295 U.S. at 629.

436. Myers v. United States, 272 U.S. 52, 176 (1926).

President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in . . . *Myers*."[437] Indeed, the existence of this power is the default. In certain, limited instances, the Court has carved out what it describes as "exceptions to the President's unrestricted removal power."[438] The implication is that Congress cannot insulate officials from removal if those officials do not fall under one of the exceptions.

One of the exceptions is for members of multimember, quasi-judicial (and quasi-legislative) agencies, like the FTC of 1935 or the War Claims Commission of *Wiener*.[439] As this Part has explained, commissioners on the modern FTC do not qualify for this exception. The other exception is for "certain *inferior* officers with narrowly defined duties."[440] But, again, the commissioners on the modern FTC do not qualify. They are not inferior officers. And the breadth of the agency's jurisdiction is as large as that of the economy itself—a stark contrast to the limited jurisdiction of the independent counsel at issue in *Morrison*. There, the counsel's jurisdiction had to be "demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case."[441] The fact that the independent counsel could undertake civil litigation on behalf of the United States within this limited jurisdiction does not change the conclusion.[442]

In *Seila Law*, the Court stated that "the CFPB Director is hardly a mere legislative or judicial aid," which the Court in *Humphrey's Executor* had concluded that the 1935 FTC was.[443] The *Seila Law* Court further contrasted the 1935 FTC's powers of "making reports and recommendations to Congress" and "submitting recommended dispositions to an Article III court" with the CFPB Director's "authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U.S. economy" and to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications."[444] Moreover, the Court noted the Director's "power to seek daunting monetary

437. *Seila L.*, 591 U.S. at 204 (majority opinion).

438. *Id.*

439. *Id.*

440. *Id.*

441. Morrison v. Olson, 487 U.S. 654, 679 (1988).

442. *See* Walmart MTD, *supra* note 417, at 11 ("[T]he power of federal officers to enforce federal law by suing alleged violators in federal court on behalf of the United States is part of the President's executive power [and] . . . may not be granted to *principal* officers whom the President . . . cannot remove . . . ." (citing Buckley v. Valeo, 424 U.S. 1 (1976); *Seila L.*, 591 U.S. at 213) (emphasis added)).

443. *Seila L.*, 591 U.S. at 218.

444. *Id.* at 218–19.

penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*."[445]

The Court could have been describing the modern FTC as distinguished from the 1935 FTC. The FTC now has the "authority to promulgate binding rules fleshing out . . . a broad prohibition on unfair and deceptive practices" in general.[446] It also has the "power to seek daunting monetary penalties against private parties on behalf of the United States in federal court."[447] And although the Court in *Humphrey's Executor* may have been wrong when it said that the FTC does not exercise executive *power*, the agency's modern authorities are far closer to the core of that power—as opposed to the adjudicatory and report-making authorities of the 1935 FTC that were perhaps on the periphery.[448]

Dissenting in *Seila Law*, Justice Kagan argued that the distinction is meaningless because "then, as now, the FTC's organic statute broadly 'empowered and directed' the agency 'to prevent persons' or businesses 'from using unfair methods of competition in commerce.'"[449] To contend that this authority was not meaningfully different in 1935, she submitted that "the agency could and did run investigations, bring administrative charges, and conduct adjudications. And if any person refused to comply with an order, the agency could seek its enforcement in federal court under a highly deferential standard."[450] But, as this Article has demonstrated, these powers were substantially different than the ones that the agency exercises today—which include the power to initiate civil litigation for financial penalties.[451] Justice Kagan continued by asserting that "the FTC has always had statutory rulemaking authority, even though (like several other agencies) it relied on adjudications until the 1960s."[452] She cast doubt on the idea "that a court including Charles Evans Hughes, Louis Brandeis, Benjamin Cardozo, and

445. *Id.* at 219.

446. *Id.* at 218.

447. *Id.* at 219.

448. *See* Crane, *FTC Independence After* Seila Law, *supra* note 7, at 19 ("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."); *cf.* Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439, 460 (2021) ("[I]t is difficult to identify any function more clearly 'executive' in nature than prosecution.").

449. *Seila L.*, 591 U.S. at 286 n.10 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (quoting Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719).

450. *Id.* (citation omitted).

451. *See* Walmart MTD, *supra* note 417, at 10 ("Decades after *Humphrey's Executor*, Congress for the first time purported to grant the FTC the litigation powers the agency invokes in this suit. In 1973, Congress gave the FTC power to seek permanent injunctive relief in the absence of an agency adjudication. And in 1975, Congress gave the FTC power to seek monetary relief, in the form of civil penalties or consumer redress. Each of these grants of authority . . . is incompatible with the FTC's status as a valid independent agency." (citations omitted)).

452. *Seila L.*, 591 U.S. at 286 n.10.

Harlan Stone somehow misunderstood these powers."[453] Yet the dissent is begging the question on this point—many signs point to the conclusion that the FTC did not have rulemaking authority in 1935, and the Court in 1935 did not misunderstand those powers at all when it assumed that the FTC did not have them.[454]

Under *Morrison*, the question is whether "removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[455] If so, they violate Article II, and the President can disregard them.[456] *Morrison* instructs that one must analyze "the functions of the officials in question" when making that determination.[457] Here, the functions of the FTC commissioners lead to a clear conclusion: The removal restrictions violate Article II. FTC commissioners are principal officers who lead and direct an agency that undertakes civil litigation—concerning wide swaths of the American economy—on behalf of the government.[458] That litigation includes seeking injunctive relief and monetary penalties. Additionally, the commissioners engage in rulemaking to flesh out the broad "unfair or deceptive acts or practices" standard that Congress legislated. The FTC commissioners are executive officials. And the President may remove them at will.

CONCLUSION

Conventional wisdom dictates that the President cannot remove FTC commissioners at will—unless and until the Supreme Court overrules *Humphrey's Executor*. This intuition makes some sense; after all, the Court's opinion in *Humphrey's Executor* explicitly held that the FTC commissioners' removal protections were constitutional. But the conventional wisdom is wrong. The modern FTC is a meaningfully different agency than the one that the Court evaluated in *Humphrey's Executor*. Principal officers at the agency now exercise core executive functions with a wide jurisdiction to do so. That means that *Humphrey's Executor* no longer answers the question whether the President can remove FTC commissioners. And because the removal protections violate Article II, the President can ignore them.

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453. *Id.*

454. Also, "the Court [in *Seila Law*] declined to embrace the view that *Humphrey's Executor* allows Congress to make agencies independent because and when they engage in rulemaking." Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 109.

455. Morrison v. Olson, 487 U.S. 654, 691 (1988).

456. *Id.* at 690.

457. *See id.* at 691.

458. *See* Crane, *Debunking* Humphrey's Executor, *supra* note 6, at 1853–55 (noting that the FTC's litigation activities sometimes conflict with the position of the President and the Justice Department, thereby undermining the President's authority over government litigation).

EPILOGUE

Upon returning to the White House in January of this year, President Donald J. Trump decided to test the constitutionality of the statutory removal protections that are the subject of this Article. In March, President Trump fired FTC Commissioners Rebecca Slaughter and Alvaro Bedoya without specifying a recognized cause.[459] The commissioners sued in the U.S. District Court for the District of Columbia, citing the removal protections.[460] They sought declaratory and injunctive relief—including "an injunction against [the other FTC commissioners and the Commission's executive director] ordering that they treat Plaintiffs as FTC Commissioners, including by permitting them access to their office, staff, [and] electronic devices, [and] recei[pt of] all wages and other benefits and resources of their office."[461] Relying on *Humphrey's Executor* as precedent, the district court granted summary judgment to Slaughter.[462]

The government applied to the D.C. Circuit for a stay of the district court's ruling, which the appeals court denied over a dissent by Judge Rao.[463] The government then applied to the Supreme Court for a stay and petitioned for certiorari before judgment.[464] The Court granted both requests, setting the case for argument in December 2025—just after this Article will go to print.[465] The questions presented are: "(1) Whether the statutory removal protections for members of the Federal Trade Commission violate the separation of powers and, if so, whether *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overruled," and "(2) Whether a federal court may prevent a person's removal from public office, either through relief at equity or at law."[466]

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459. *See* Will Weissert & Christopher Rugaber, *Trump Fires 2 Democrats on the Federal Trade Commission, Seeking More Control over Regulators*, ASSOCIATED PRESS (Mar. 18, 2025, at 20:52 CT), https://apnews.com/article/trump-ftc-firings-bedoya-slaughter-488bfe5419e48d5acbd95d3f9401404b [https://perma.cc/DB3Z-278L].

460. *See* Complaint at 2–3, Slaughter v. Trump, No. 25-cv-00909, (D.D.C. Mar. 27, 2025).

461. *Id.* at 20. Commissioner Bedoya formally resigned from his position at the FTC during the pendency of the lawsuit, thereby mooting his claims. *See* Slaughter v. Trump, No. 25-cv-00909, 2025 WL 1984396, at *4 (D.D.C. July 17, 2025). Slaughter, however, proceeded. *See id.* at *15.

462. *See id.* at *7, *20.

463. *See* Slaughter v. Trump, No. 25-5261, 2025 WL 2551247, at *8 (D.C. Cir. Sep. 2, 2025). A draft of this Article was posted to SSRN in early 2025, and Judge Rao cited this draft in her dissent from the denial of a stay pending appeal. *See id.* at *13 n.7 ("In light of the Supreme Court's explicit recognition that, despite the reasoning of *Humphrey's Executor*, the 1935 FTC exercised executive power, there is no need to parse the past and present powers of the FTC. The Commission exercised executive power in 1935, and Congress has only expanded the powers of the FTC in the intervening years. *See* Eli Nachmany, *The Original FTC*, 77 ALA. L. REV. 1 (forthcoming 2025) (unpublished manuscript at 42–49).". Pages 42–49 of the unpublished manuscript are pages 40–47 in this published Article.

464. *See* Application to Stay the Judgment of the United States District Court for the District of Columbia and Request for Administrative Stay at 1, Trump v. Slaughter, No. 25A264 (25-332) (U.S. Sep. 4, 2025).

465. *See* Trump v. Slaughter, No. 25A264 (25-332), 2025 WL 2692050 (U.S. Sep. 22, 2025) (mem.).

466. *Id.*