

Independent Agencies Under a Microscope— What Are the Implications for FERC?

Client Alerts

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In his second week in office, President Trump fired Gwynne Wilcox (a member of the NLRB). The firing was communicated by an email sent from the Deputy Director of the Office of Presidential Personnel with a statement from the President. The statement did not purport to find either “neglect of duty or malfeasance in office,” as required by the National Labor Relations Act’s removal provision. And just last week, the Acting Solicitor General informed Congress that her office will no longer defend the constitutionality of certain for-cause removal provisions that apply to multimember independent agencies and will ask the Supreme Court to reverse a landmark 1935 precedent that recognized an exception to the President’s power to remove principal officers.

What, if any, implications might these shifts have for FERC? The legal issues raised by the President firing Wilcox without statutory cause are similar to those that would be raised if the President were to fire a FERC Commissioner without statutory cause. In practical terms, however, unless and until the Supreme Court reverses its 1935 precedent, firing and replacing a FERC Commissioner without asserting cause might create new risks to FERC’s statutory and policy mission—a mission that is critical to the President’s agenda. In any event, the constitutionality of limits on the President’s power to remove members or commissioners of multimember agencies will be tested in the near term.

The organic statutes governing both the NLRB and FERC impose a for-cause requirement for removal of appointees from office by the President. Section 3 of the National Labor Relations Act currently provides that NLRB Members “may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” 29 U.S.C. § 153(a). For its part, Section 401 of the Department of Energy (DOE) Act provides that FERC Commissioners “may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” 42 U.S.C. § 7171(b)(1).

The firings at NLRB

In the email statement firing Wilcox, the President began by noting that “heads of agencies within the Executive Branch must share the objectives of my administration.” The President’s statement did not claim any neglect of duty or malfeasance in office:

The aims and purposes of the Administration with respect to the work on the Board can be carried out most effectively with personnel of my own selection. To that end, effective as of this date, Gwynne A. Wilcox and Jennifer Abruzzo are hereby removed from the office of Members of the National Labor Relations Board.

The President further stated that Wilcox has “not, in my judgment, been operating in a manner consistent with the objectives of my administration.” He also claimed that Wilcox had adopted decisions that “improperly cabined employers’ rights to speak on the subject of unionization, raising serious First Amendment concerns,” and “vastly exceeded the bounds of the National Labor Relations Act.” He then set forth his lack of confidence that Wilcox “can fairly evaluate matters before [her] without unduly disfavoring the interests of employers large and small.”

The email statement includes a lengthy footnote that argues that the National Labor Relations Act’s removal provision is inconsistent with Article II’s vesting of the executive power in the President and with his constitutional duty to ensure that the laws are faithfully executed. The footnote concludes by finding that the President does not need cause to remove Wilcox. According to the President’s statement, the recognized exception to his removal power for multimember agencies does not apply to NLRB because it is not balanced on partisan lines and it exercises core executive powers.

The origins and impacts of Humphrey’s Executor

This dispute dates back many years. In 1934, President Franklin D. Roosevelt fired William Humphrey, a member of the FTC who was a frequent thorn in the President’s side. By statute, the President could remove Humphrey “for inefficiency, neglect of duty, or malfeasance in office.” *Humphrey’s Ex’r v. United States*, 295 US 602, 620 (1935). But no such allegations were made.

After Humphrey’s death, his executor sued to recover his salary. In *Humphrey’s Executor*, the Supreme Court confirmed that Congress could limit the President’s ability to remove the heads of administrative agencies. The Court unanimously held that “[t]he authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power . . . to forbid their removal except for cause in the meantime.” 295 US at 629. In doing so, the Court stated that its decision was limited to “officers of the kind here under consideration.” The Court described the FTC as “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,” and thus “cannot in any proper sense be characterized as an arm or an eye of the executive.” d. at 628.

Humphrey’s Executor paved the way for the modern administrative state. Starting in the New Deal era, Congress created a variety of independent agencies intended to regulate critical parts of the

economy, while insulating these agencies from concerns over undue political influence or pressure.

In recent years, a body of thought has questioned the correctness of *Humphrey's Executor* and the independent agencies that have been created in reliance on that decision. Under this view, ensuring democratic accountability and individual liberty requires presidential control of the agencies and officers of the Executive Branch. *See, e.g., In re Aiken County*, 645 F.3d 428, 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (emphasizing that “[t]he executive Power shall be vested in a President of the United States of America,” U.S. Const. art. II, “not some of the executive power, but all of it”).

Over 80 years after *Humphrey's Executor*, the Supreme Court in *Seila Law* held that Congress could not permissibly limit the President's removal power over “an independent agency led by a single Director and vested with significant executive power.” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 220 (2020). The Court characterized *Humphrey's Executor* as permitting 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.” *Id.* at 216. The majority stated that the applicability of *Humphrey's Executor* depends on the “characteristics of the agency before the Court.” *Id.* at 215. Justice Thomas, in a partial dissent joined by Justice Gorsuch, called *Humphrey's Executor* a “direct threat to our constitutional structure and, as a result, the liberty of the American people.” *Id.* at 239 (Thomas, J., dissenting in part). In his view, “the foundation for *Humphrey's Executor* is not just shaky. It is nonexistent.” *Id.* at 248 (Thomas, J., dissenting in part).

The Acting Solicitor General has now stated her office's position that statutory tenure protections relying on the *Humphrey's Executor* exception for members of several independent agencies—including the FTC, the NLRB, and the Consumer Product Safety Commission—are unconstitutional. In her view, “[a]s presently constituted, those commissions exercise substantial executive power,” including (as *Seila Law* found) the power to promulgate binding rules and unilaterally issue final decisions through administrative adjudications. She concludes, again relying on *Seila Law*, that “[a]n independent agency of that kind has ‘no basis in history and no place in our constitutional structure.’” The Acting Solicitor General also expresses her intent to urge the Supreme Court to overrule the 1935 decision, “[t]o the extent that *Humphrey's Executor* requires otherwise.”

Implications for FERC

So what to make of implications for FERC? While the Acting Solicitor General's recent letter does not mention FERC, the for-cause removal language governing FERC is very similar to the language governing the NLRB, which is identified in the letter. If anything, FERC's statute offers the President more flexibility on removal for cause, because cause is defined under the DOE Act to include “inefficiency” in addition to neglect and malfeasance. The President's recent Executive Order, *Implementing the President's “Department of Government Efficiency” Workforce Optimization Initiative*, appears to apply to FERC. Might an alleged failure to implement DOGE policies or the

Executive Order’s personnel reform directives be deemed “inefficiency”? Might we see energy policy disagreements between the President and a FERC Commissioner characterized by the President as “inefficiency”?

If, while *Humphrey’s Executor* is still on the books, (1) the President fires a FERC Commissioner without statutory cause and (2) a replacement Commissioner is nominated and confirmed, that might create incremental risk. Litigants might challenge subsequent orders on the ground that the replacement Commissioner’s vote was invalid. Putting aside delegated orders, FERC issues about 1,500 orders each year. Some of those orders will be important to the President’s agenda.

If *Humphrey’s Executor* is overruled, initially that probably will mean more frequent changes in the composition of FERC, particularly when the White House changes hands. Over time, it is conceivable that FERC and similar agencies might be restructured (though not all multimember agencies have for-cause removal protections; the Equal Employment Opportunity Commission, for example, lacks such protections). Multimember agencies like FERC might instead be refashioned to resemble single-administrator agencies like the Environmental Protection Agency.

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